



ENTERED

F 2302

San Francisco Law Library

426 CITY HALL

No. 159451

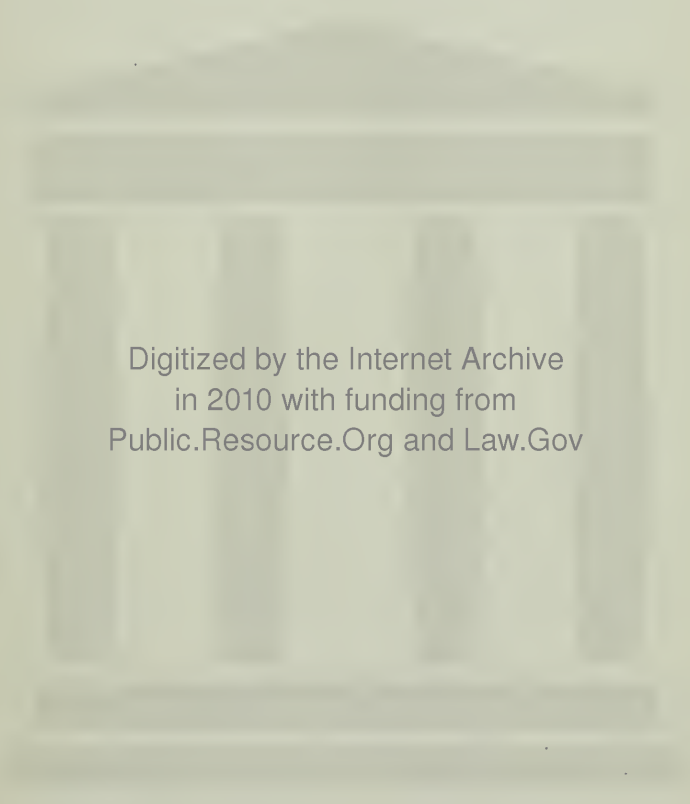
EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

1/2



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov



v. 2937

No. 14,750

IN THE

United States Court of Appeals
For the Ninth Circuit

PHYLLIS BAEKGAARD, formerly Phyllis
Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO,
Individually and as Administratrix of
the Estate of George S. Carreiro, De-
ceased, and WELLS FARGO BANK &
UNION TRUST COMPANY,

Appellees.

APPELLANT'S OPENING BRIEF.

ALFRED JAMES SMITH,

110 Sutter Street, San Francisco 4, California,

Attorney for Appellant.

FILE

JUL 28 1953



Subject Index

	Page
Jurisdiction	1
Statement of the case.....	2
Specification of errors.....	7
Argument	8
(1) Genee Carreiro relinquished all her claims or expectancies as a beneficiary under the policies by entering into the property settlement agreement and there was no need thereafter for any notice to the insurance company or for the execution of any formal change of beneficiary	8
(2) As a result of the waiver of her expectancy by Genee Carreiro, appellant, as the secondary beneficiary under the policies, became entitled to their proceeds in preference to the estate of the assured.....	11
Conclusion	13

Table of Authorities Cited

Cases

Pages

Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 241 P. 2d 544	12
Thorp v. Randazzo, 41 Cal. 2d 770, 246 P. 2d 38.....	8, 9, 10

Codes

Title 28 United States Code, Section 1291.....	2
Title 28 United States Code, Section 1335.....	2
19 A.L.R. 2d 5, 108-109.....	10



No. 14,750

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PHYLLIS BAEKGAARD, formerly Phyllis
Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO,
Individually and as Administratrix of
the Estate of George S. Carreiro, De-
ceased, and WELLS FARGO BANK &
UNION TRUST COMPANY,

Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This action arose out of conflicting claims to the proceeds of three insurance policies in the total face amount of \$25,000.00 issued by New England Mutual Life Insurance Company on the life of George S. Carreiro, deceased.

The action was originally filed by New England Mutual Life Insurance Company, a Massachusetts corporation, as an action in interpleader under, Sec-

tion 1335 of Title 28 United States Code (3-22).¹ Genee M. Carreiro, the first and divorced wife of the assured (a citizen of California), Irene G. Carreiro, his second wife (a citizen of California), and Phyllis Baekgaard, his daughter (a citizen of Illinois), were named as defendants and the proceeds of the three policies were deposited in court. Subsequently, Wells Fargo Bank & Union Trust Company (a California corporation) was allowed to intervene as the executor of the last will and testament of the assured (37-41).

The jurisdiction of this court is based upon Section 1291 of Title 28 United States Code.

A fourth policy in the face amount of \$5,000.00 issued by Prudential Life Insurance Company is mentioned in findings XII and XIII (52). That policy is the subject of a separate action (filed after entry of the judgment in this action) which is now on appeal before this court (No. 14,878). Further proceedings in that action were stayed by order of this court pending determination of this appeal.

STATEMENT OF THE CASE.

At the death of George Carreiro (January 2, 1954), all of the policies designated Genee Carreiro (described in the policies as "Goldie M. Carreiro, wife of the Insured"), as the primary beneficiary. In the event of her death before that of the assured, his

¹All references are to pages of the transcript.

daughter Phyllis was designated as the secondary beneficiary.

George and Genee were no longer married, however, at the time of his death. An interlocutory judgment of divorce had been granted Genee on August 21, 1951, followed by a final decree on August 22, 1952.

On August 7, 1951 (two weeks before the interlocutory judgment of divorce) they had entered into a property settlement agreement which provided in part as follows:

“Sixth: The property of the parties hereto shall be divided by said parties as follows:

* * * * *

“7. The husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claims of the wife thereto.

“Policy No. 820167 in the sum of \$10,000.00, New England Mutual Life Insurance Company.

“Policy No. 842502 in the sum of \$15,000.00, New England Mutual Life Insurance Company.

“Policy No. 725936 in the sum of \$5,000.00, New England Mutual Life Insurance Company.

“Policy No. 725937 in the sum of \$5,000.00, New England Mutual Life Insurance Company.

“Policy No. 1154064 in the sum of \$15,000.00, New England Mutual Life Insurance Company.

“Policy No. 5243932 in the sum of \$5,000.00, Prudential Insurance Company of America.”

(142-4)

Before his death, George Carreiro surrendered two of the six policies (the first and the second). The

remaining four are the policies involved in this action and in the action filed by Prudential Insurance Company of America.

The agreement adjusted and settled all of the property rights of the parties including "any and all community rights, property rights, right to support and maintenance, and other matters" (140). Its comprehensive provisions which are printed at pages 139-146 of the transcript need not be quoted in this brief except for one other clause which provided as follows:

"Fourth: That said parties hereto each hereby waive any and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and each of the said parties hereby waive any and all right of homestead in the real property of the other, probate or otherwise, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and from the date of this agreement to the end of the world said waiver of the other in the estate of the other party shall from the date of this agreement be effective and they shall have all the rights of single persons and maintain the same relation of such toward each other." (141-2).

After its execution, George Carreiro forwarded a copy of the agreement to New England Mutual Life

Insurance Company. On September 6, 1951, the company sent him the following letter:

“September 6, 1951.

“Dr. George S. Carreiro,
490 Post Street
San Francisco, California

“Re: Policies No. 725936-7, 820167,
842502 and 1154064

“Dear Dr. Carreiro:

“We wish to thank you for forwarding to us a certified copy of the property settlement agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent records at the Home Office, and we can now consider that Mrs. Carreiro has no further community property interest in these policies.

“If you wish to make any changes in the beneficiary arrangement please advise and forms will be prepared for your signature. We note that we are holding all of your policies with the exception of Policy No. 842502 which is presently assigned to the bank.

“Yours sincerely,

“Assistant Cashier.”

(54)

Although George Carreiro thereafter had occasion to go to the office of the company in connection with the two policies which he surrendered, he took no other step to change the beneficiary of the three policies involved in this action (or of the Prudential policy) (69-71).

In an attempt to show to whom George Carreiro intended that the proceeds of the policies should go,

a number of witnesses were called by the various claimants to testify to conversations which they had had with him. The trial court refused, however, to believe any of their testimony and expressly found that none of it was "credible" (56, finding XXV). For that reason and because of that finding, none of that testimony is relied upon by us as a basis for the reversal of the judgment. Some of it was included in the printed transcript but not at our request.

The trial judge divided the proceeds of the policies equally between the four claimants (Genee Carreiro, Irene Carreiro, Phyllis Baekgaard and Wells Fargo Bank & Union Trust Company, as executor of George Carreiro's estate). This was not done on the basis of findings that each was *entitled* to 25% of the proceeds but pursuant to a stipulation entered into by *three* of the claimants (Genee Carreiro, Irene Carreiro and Wells Fargo Bank). Phyllis Baekgaard refused to enter into that stipulation and chose instead to take this appeal.

Her position is as follows:

Under the law of California, which is admittedly applicable to the case, Genee Carreiro relinquished all of her claims under the policies by entering into the property settlement agreement, including whatever claims or expectancies she may have had as a beneficiary thereunder. The relinquishment was completed upon the execution of the agreement and there was no need thereafter for any notice to the insurance company or for the execution of any formal change of beneficiary.

As a result of that relinquishment, appellant, as the secondary beneficiary under the policies, became entitled to their proceeds in preference to the estate of the assured (represented by the Wells Fargo Bank).

Under no conceivable theory, is Irene Carreiro (the second wife of the assured whom he married on December 20, 1952) entitled to any of the proceeds. She is not designated as a beneficiary. No basis for her claim is suggested in her answer and cross-complaint (34-36). In fact, after Wells Fargo Bank intervened in the action, she admitted that the bank was entitled to the proceeds as executor of George Carreiro's estate (paragraph I of her answer to the pleading in intervention (48) admits each and every allegation of that pleading, including paragraph IX (41) in which the bank asserts its claim to the proceeds).

SPECIFICATION OF ERRORS.

Although a more detailed specification of errors was originally filed in this court (150), there is actually only one all-comprehensive error in the case: under the applicable California law, the proceeds of the policies were payable to appellant. The trial court erred in not making them payable to her.

a number of witnesses were called by the various claimants to testify to conversations which they had had with him. The trial court refused, however, to believe any of their testimony and expressly found that none of it was "credible" (56, finding XXV). For that reason and because of that finding, none of that testimony is relied upon by us as a basis for the reversal of the judgment. Some of it was included in the printed transcript but not at our request.

The trial judge divided the proceeds of the policies equally between the four claimants (Genee Carreiro, Irene Carreiro, Phyllis Baekgaard and Wells Fargo Bank & Union Trust Company, as executor of George Carreiro's estate). This was not done on the basis of findings that each was *entitled* to 25% of the proceeds but pursuant to a stipulation entered into by *three* of the claimants (Genee Carreiro, Irene Carreiro and Wells Fargo Bank). Phyllis Baekgaard refused to enter into that stipulation and chose instead to take this appeal.

Her position is as follows:

Under the law of California, which is admittedly applicable to the case, Genee Carreiro relinquished all of her claims under the policies by entering into the property settlement agreement, including whatever claims or expectancies she may have had as a beneficiary thereunder. The relinquishment was completed upon the execution of the agreement and there was no need thereafter for any notice to the insurance company or for the execution of any formal change of beneficiary.

As a result of that relinquishment, appellant, as the secondary beneficiary under the policies, became entitled to their proceeds in preference to the estate of the assured (represented by the Wells Fargo Bank).

Under no conceivable theory, is Irene Carreiro (the second wife of the assured whom he married on December 20, 1952) entitled to any of the proceeds. She is not designated as a beneficiary. No basis for her claim is suggested in her answer and cross-complaint (34-36). In fact, after Wells Fargo Bank intervened in the action, she admitted that the bank was entitled to the proceeds as executor of George Carreiro's estate (paragraph I of her answer to the pleading in intervention (48) admits each and every allegation of that pleading, including paragraph IX (41) in which the bank asserts its claim to the proceeds).

SPECIFICATION OF ERRORS.

Although a more detailed specification of errors was originally filed in this court (150), there is actually only one all-comprehensive error in the case: under the applicable California law, the proceeds of the policies were payable to appellant. The trial court erred in not making them payable to her.

ARGUMENT.

- (1) GENE E CARREIRO RELINQUISHED ALL HER CLAIMS OR EXPECTANCIES AS A BENEFICIARY UNDER THE POLICIES BY ENTERING INTO THE PROPERTY SETTLEMENT AGREEMENT AND THERE WAS NO NEED THEREAFTER FOR ANY NOTICE TO THE INSURANCE COMPANY OR FOR THE EXECUTION OF ANY FORMAL CHANGE OF BENEFICIARY.

The California cases on the subject are clear.

The beneficiary under a policy of insurance subject to change by the assured, like the beneficiary under a will, has a mere expectancy dependent upon designation at the time of the assured's death.

The parties to a property settlement agreement *can* agree to the relinquishment of such an expectancy provided that the agreement be clear and that nothing be left to implication.

The latest and leading California case is *Thorp v. Randazzo*, 41 Cal. 2d 770, 246 P. 2d 38, decided in 1953 by the Supreme Court of California. The facts in that case were as follows:

The plaintiff entered into a property settlement agreement with her husband under the terms of which she waived all claims to two life insurance policies (of which she was the beneficiary) upon his life. Following their divorce, the husband changed the beneficiary of one of the policies but made no change as to the other. After his death, the wife filed an action for declaratory relief to determine her rights under that policy claiming to be entitled to its proceeds as the beneficiary thereof.

It should be noted that, contemporaneously with the execution of the property settlement agreement,

the wife had signed a printed change of beneficiary form pertaining to that policy. Although he survived for approximately seven years, however, the husband had failed to send the form to the insurance company. In other words, the case was much more favorable to the divorced wife on its facts than this case is. Unlike Genee Carreiro in this case, the plaintiff in *Thorp v. Randazzo* was in a position to contend that, by requesting her to sign and then not sending the form to the company, her husband had *expressed* the intention to continue her as the beneficiary of the policy.

The court nevertheless held that the wife was not entitled to the proceeds of the policy. The opinion is so clearly in point that we quote from it at length in an appendix to this brief. Let it merely be emphasized here that *it is by and because of the property settlement agreement that the wife was held to have waived her claim or expectancy as the beneficiary under the policy and that no further action was needed on the part of her former husband to make the change complete.*

In *Thorp v. Randazzo*, *supra*, as in this case, the insurance company had paid the proceeds of the policy into court so that no question could be raised as to whether *its* requirements for a change of beneficiary had been complied with. Whatever may be the law in a case in which the insurance company is still an active party to the action and claims that its requirements for a change of beneficiary have not been complied with, it is settled that those require-

ments cease to be material in a case in which the proceeds have been paid into court and litigation is exclusively between adverse claimants to the proceeds (See the cases cited in the annotation entitled "*Insurance Beneficiary—Change—Manner*", 19 A.L.R. 2d 5, 108-109).

Under the rule of the *Thorp* case, the expectancy of a beneficiary under a life insurance policy must be held to have been waived if it appears to have been brought to his or her attention and if his or her intention to disclaim future rights which might develop from such an expectancy is made clear in the property settlement agreement.

It is apparent that Genee Carreiro's expectancies under the policies were brought to her attention (since the agreement specifically mentioned the policies). Her intention to disclaim future rights which might develop from those expectancies was made clear by her waiver of "any claims" to the policies (143).

Moreover, the agreement covered *all* of the property of the parties. Hence, by accepting the provisions for her benefit, Genee Carreiro must be held to have released her husband with respect to *all* other property. Finally, it must be emphasized that she also expressly waived all her rights to his estate either under the laws of succession or under a will as well as all her rights to a probate homestead and to a family allowance (141-2). In other words, she waived *all* of the possible expectancies which she might have upon his death.

Since Genee Carreiro gave up her expectancies as a beneficiary under the policies by the execution of the agreement, it is completely immaterial, as far as she is concerned, that George Carreiro did not execute a formal change of beneficiary. Nor is it material that, after he had forwarded the agreement to the insurance company, the company wrote to him that it considered that Mrs. Carreiro (Genee) had no further community property interest in the policies. What the company considered her rights to be has no bearing on the question of what her rights in fact were.

Finally, it is similarly immaterial that the company also wrote to George Carreiro that, if he wished to make any changes of beneficiaries, forms would be prepared for his signature.

(2) AS A RESULT OF THE WAIVER OF HER EXPECTANCY BY GENE E CARREIRO, APPELLANT, AS THE SECONDARY BENEFICIARY UNDER THE POLICIES, BECAME ENTITLED TO THEIR PROCEEDS IN PREFERENCE TO THE ESTATE OF THE ASSURED.

It is apparent from Conclusion of Law I (57) that the basis of the trial court's decision (that appellant was not entitled to the proceeds of the policies) was that the condition precedent to the payment of the proceeds to her, namely, the death of the primary beneficiary, had not been fulfilled.

Under the law of California, however, it was not necessary for that condition to be fulfilled for appellant to become entitled to the proceeds.

The leading case on that point is *Beck v. West Coast Life Ins. Co.*, 38 Cal. 2d 643, 241 P. 2d 544. The policy in that case was payable to the husband of the assured as primary beneficiary and, in the event that he did not survive her, to an alternative beneficiary. The primary beneficiary murdered the assured and was convicted of the crime. Since he thereby forfeited his rights under the policy, the question arose as to whether the alternative beneficiary or the executor of the estate of the assured was entitled to the proceeds.

It was contended on behalf of the executor, as it was contended in this case, that, the primary beneficiary not having predeceased the assured, the condition precedent to the payment of the proceeds to the alternative beneficiary had not occurred and she accordingly was not entitled thereto.

The court held, however, that the proceeds should be paid to her since, by selecting her as an alternative beneficiary, the assured had expressed a preference for her as against the executor of her estate. Although the beneficiary clause of the policy could not be given full effect (since, under the law, the murderer was not entitled to the proceeds), it was given effect as far as possible.

Similarly, in this case, the beneficiary clause of the policies should have been given effect as far as possible. This could be done only by holding that appellant was entitled to the proceeds since the agreement precluded Genée Carreiro from receiving them and the assured had clearly expressed the intention

that any interest that his estate might have in the proceeds should be subordinate to that of appellant.

CONCLUSION.

Genee Carreiro waived her rights. Irene Carreiro has no rights other than through her husband's estate. The estate itself would be entitled to the proceeds only if appellant had predeceased her father.

It follows that the trial court should have awarded the proceeds to appellant and that its judgment holding that she is entitled to only 25% thereof should be reversed.

Dated, San Francisco, California,
January 25, 1956.

Respectfully submitted,
ALFRED JAMES SMITH,
Attorney for Appellant.

(Appendix Follows.)

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

2. The second part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

3. The third part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

4. The fourth part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

5. The fifth part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

6. The sixth part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

7. The seventh part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

8. The eighth part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

9. The ninth part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

10. The tenth part of the document is a letter from the President to the Congress, dated January 3, 1801. It is a very important document, as it contains the President's first message to the Congress, and it is the only one of its kind in the history of the United States.

Appendix.

Appendix

THORP v. RANDAZZO, 41 CAL. 2d 770, 773-776.

Plaintiff makes no claim to the insurance proceeds by reason of her former marital relationship with the deceased or contrary to her waiver of all community interest in the policy, but rather she relies on her distinct status as the named beneficiary on the policy at the time of deceased's death (*Shaw v. Board of Administration*, 109 Cal. App. 2d 770, 774, 241 P. 2d 635). The position of a beneficiary named in an insurance policy subject to change by the insured is similar to that of a beneficiary of a will, a mere expectancy dependent on designation at the time of the insured's death (*Grimm v. Grimm*, 26 Cal. 2d 173, 176, 157 P. 2d 841). Where a property settlement agreement covers *all* of the property of the parties and the wife, in accepting certain provisions for her benefit, fully releases the husband with respect to all other property, such release ordinarily would cover and include her interest as the designated beneficiary on an insurance policy; but where the language is not broad enough to encompass such an expectancy or an intent appears to exclude such rights as a present part of the settlement, the wife may still take as beneficiary if the policy so provides (*Miller v. Miller*, 94 Cal. App. 2d 785, 789, 211 P. 2d 357). In interpreting property settlement agreements, courts weigh carefully the language employed by the parties in measure of the renunciation of their respective rights. To this end, it is the settled rule that "general expressions

or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other.” (*Grimm v. Grimm*, supra, p. 176.) The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change (*Shaw v. Board of Administration*, supra, p. 776; also *Estate of Crane*, 6 Cal. 2d 218, 221, 57 P. 2d 476, 104 A.L.R. 1101), but each case must be decided upon its own facts (*Miller v. Miller*, supra, p. 790).

The property settlement agreement here is quite comprehensive and establishes that a complete and final settlement was intended. No question is raised as to the fairness of its provisions or the consideration therefor. The agreement, in addition to specific mention of the insurance policy in question, with express recital of plaintiff's waiver of “all claims to any benefits that she may have at present, or which may hereafter be derived” therefrom and her agreement to execute the papers necessary to effect such release of interest in the policy, further provides: “The said parties hereto each hereby waive any right and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by laws of succes-

sion, and said parties hereby release one to the other all right to be the administrator or administratrix or executor or executrix of the estate or will of the other, * * * and from the date of this agreement hereafter said waiver of the other in the estate of the other shall be effective and they shall have the right of single persons and maintain the same relation of such toward each other * * * this agreement is a full and final settlement between said parties and each party hereto has had independent legal advice" thereon.

This language is almost identical with that used in *Sullivan v. Union Oil Co.*, 16 Cal. 2d 229, 105 P. 2d 922, wherein it was held that the property settlement agreement not only terminated the wife's community interest in a certain benefit fund maintained by the husband's employer, but also any rights which she may have had as a named beneficiary in connection with such fund. Practically the same language was construed in *Meherin v. Meherin*, 99 Cal. App. 2d 596, 222 P. 2d 305, to effect a like release of the proceeds of an insurance policy, which the wife claimed by reason of her continuing designation as beneficiary at the time of her husband's death. As in those cases, plaintiff here of her own free will, with full knowledge of the existence of the policy and of all pertinent facts, acting under independent legal advice, and for full and valuable consideration, expressly agreed with deceased "to forever settle and divide between them all their respective properties including that of the community, to waive any right of succession or inheritance with respect to his remaining property and to

release him from any and all obligation to her which theretofore may have had existence for any reason whatsoever.” (*Sullivan v. Union Oil Co.*, supra, page 237.)

Plaintiff relies on *Grimm v. Grimm*, supra, 26 Cal. 2d 173. There the property settlement agreement between the spouses gave the husband the right to change the beneficiary on his insurance policy and the wife agreed to execute any document or instrument necessary therefor. He died without undertaking to make such a change. It was held that there was no immediate release of the wife’s interest as such beneficiary, that the agreement left it to the husband to decide in the future whether or not he desired to change the beneficiary, and that not having done so the wife was entitled to receive his bounty to that extent. Moreover, since the wife in the Grimm agreement waived all rights of inheritance in her husband’s estate “except * * * as may be provided in any will and/or codicil * * * in effect at the date of his death,” it was concluded that it was “the intention of the spouses to exclude from the agreement rights that might accrue to [the wife] at the death of the husband as a result of his bounty” (p. 179). The court then observed the distinction in the parties’ agreement in *Sullivan v. Union Oil Co.*, supra, 16 Cal. 2d 229, where the language indicated a “present” not a possible future “renunciation by the husband of the wife as beneficiary.” (*Grimm v. Grimm*, supra, p. 180; in accord *Meherin v. Meherin*, supra, 99 Cal. App. 2d 596, 598).

Expectancies under a will or an insurance policy may be regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights which might develop from such expectancies is made clear in their property settlement agreement (*Estate of Crane*, supra, 6 Cal. 2d 218, 221; *Grimm v. Grimm*, supra, 26 Cal. 2d 173, 177). But in the present case specific reference was made in the agreement to the insurance policy, and plaintiff expressly waived all claim to "any benefits that she may have at present, or which may hereafter be derived from" such policy. This language clearly indicates that the parties' attention had been directed to the expectancy of the insurance proceeds, and that it was intended that plaintiff waive all interest therein, present and future. Thus, "the parties agreed that no rights were to accrue to her, even though she remained the beneficiary at the time of the husband's death." (*Grimm v. Grimm*, supra, p. 175.) In short, as in *Sullivan v. Union Oil Co.*, supra, 16 Cal. 2d 229, 237, plaintiff agreed to a *present* divestment of all claims that she might otherwise have in the insurance policy.



No. 14,750

IN THE

United States Court of Appeals
For the Ninth Circuit

PHYLLIS BAEKGAARD, formerly Phyllis
Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO,
Individually and as Administratrix of
the Estate of George S. Carreiro, De-
ceased, and WELLS FARGO BANK &
UNION TRUST COMPANY,

Appellees.

BRIEF FOR APPELLEES.

REGINALD G. HEARN,

351 California Street, San Francisco 4, California,

Attorney for Appellee

Genee M. Carreiro.

WILLIAM T. JOYCE,

517 Byron Street, Palo Alto, California,

Attorney for Appellee

Irene Carreiro.

COLIN P. KELLEY,

First Western Bank Building, Oakland 12, California,

Attorney for Appellee

*Wells Fargo Bank & Union
Trust Company.*

FILED

FEB 27 1956

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
I. Statement of the case.....	1
II. The appeal is frivolous and should be dismissed.....	6
III. The cases cited by appellant are inapplicable.....	9
IV. Conclusion	16

Table of Authorities Cited

	Pages
Beck v. Downey, 191 Fed. (2d) 150, 198 Fed. (2d) 626....	7, 10
Beck v. West Coast Life Insurance Co., 38 Cal. (2d) 643...	7, 9, 10, 11
Grimm v. Grimm, 26 Cal. (2d) 173.....	15
Jenkins v. Jenkins, 112 C.A. 403.....	15
Miller v. Miller, 94 C.A. (2d) 785.....	15
Shaw v. Board of Administration, 109 C.A. (2d) 770.....	15
Thorpe v. Randazzo, 41 Cal. (2d) 770.....	3, 11, 12, 13, 15



No. 14,750

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PHYLLIS BAEKGAARD, formerly Phyllis
Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO,
Individually and as Administratrix of
the Estate of George S. Carreiro, De-
ceased, and WELLS FARGO BANK &
UNION TRUST COMPANY,

Appellees.

BRIEF FOR APPELLEES.

I.

STATEMENT OF THE CASE.

Genee M. Carreiro, also known as Goldie Carreiro, and the decedent assured, Dr. George S. Carreiro, were married on January 18, 1927 (49). Genee Carreiro is the primary beneficiary of the life insurance policies described in the subject litigation (52). There was one child the issue of said marriage, namely, Phyllis Irene Carreiro, now known as Phyllis Irene

Baekgaard (50). The aforesaid child is designated as the secondary beneficiary in the aforesaid life insurance policies (53). Genee and Dr. Carreiro discovered that they could not effect a successful marriage and therefore on the 7th day of August, 1951 said parties entered into a property settlement agreement (50). The property settlement agreement which was introduced in evidence at the trial as an exhibit provided in part as follows (50):

“Sixth. The husband shall receive and be entitled to the insurance policies hereinafter listed free and clear of any claims of the wife thereto.

“Seventh. (In part.) The parties shall at any time or times hereafter make and execute and deliver any and all such further or other instruments, papers or things as the other of said parties shall require for the purpose of giving full effect to these presents and the covenants, provisions and agreements thereof.”

The life insurance policies contemplated by the within action were specifically described in the aforesaid property settlement agreement.

Genee and Dr. Carreiro were divorced on August 22, 1951 and thereafter a final decree of divorce was duly made and entered on August 22, 1952 (50). Irene Carreiro, the second wife, and Dr. George Carreiro were married on the 20th day of December, 1952 (51) and Dr. George Carreiro died on the 2nd day of January, 1954 (51) without having effected a change of beneficiary under any of the aforesaid life insurance policies or in addition thereto without having

changed his Last Will and Testament to which reference will be hereinafter set forth (51). On September 6, 1951 the insurance company directed a letter to Dr. Carreiro which stated as follows:

“We wish to thank you for forwarding to us a certified copy of the property settlement agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent records of the home office and we can now consider that Mrs. Carreiro has no further community property interest in the policies.

“If you wish to make any changes in the beneficiary arrangement please advise and forms will be prepared for your signature. We note that we are holding all of your policies with the exception of policy No. 842502 which is presently assigned to the bank.” (54)

Thereafter and on November 26, 1951 the assured cashed a \$15,000 policy and called at the office of the insurance company in order to effect this arrangement. Again on June 25, 1952 he cashed a \$10,000 policy and again called at the insurance company to effect this arrangement. At no time did he comply with the request of the insurance company to sign a change of beneficiary form (70-1-2-3). Dr. George Carreiro duly executed a Last Will and Testament on January 3, 1951, which will had not been revoked at the date of his death on January 2, 1954 (51). The will, a copy of which is in evidence, was probated and therein the first wife, namely, Genee Carreiro, was named as executrix and also a residual legatee.

The insurance policies which are the subject of this action and which were introduced in evidence provide that if the first beneficiary is not living the second beneficiary will take and that if neither beneficiary is living the executor of the Last Will and Testament of the assured will receive the proceeds of the policies (52-3).

Said insurance policies were introduced in evidence, being defendant's Exhibits G-6, G-7 and G-8, and all of said policies provide on the first pages thereof as follows:

"New England Mutual Life Insurance Company of Boston agrees to pay *at its home office in Boston, Massachusetts*, on receipt of due proof of the death of the insured, GEORGE S. CARREIRO, the face amount of \$..... to the beneficiary * * *."

Upon certain occasions prior to the execution of the aforesaid property settlement agreement Dr. George Carreiro had signed change of beneficiary forms with the insurance company in question incident to borrowing certain sums of money (55).

The aforesaid Last Will and Testament of Dr. George Carreiro was kept with his life insurance policies in his office which was located in the City and County of San Francisco, State of California (55). In addition thereto the original Last Will and Testament of the father of Dr. George Carreiro was likewise kept with the the aforesaid insurance policies and Last Will and Testament (55). At a date subsequent to the execution of the aforesaid property settle-

ment agreement and after the divorce of George and Genee Carreiro and at a time subsequent to the execution of the aforesaid Last Will and Testament of Dr. George S. Carreiro, Dr. George Carreiro destroyed the original Last Will and Testament of his father but he did not destroy his own Last Will and Testament (56).

The first wife, the second wife, the daughter and the executor of the Last Will and Testament of the deceased assured all made claim to the complete proceeds of the insurance policies and by virtue of an inability to agree in regard thereto a trial was had. The Honorable Trial Court concluded that at the date of death of Dr. Carreiro said deceased assured had manifested by conduct or otherwise an affection and desire to benefit four persons, namely, his first wife, Genee Carreiro; his daughter, Phyllis Baekgaard; his second wife, Irene Carreiro, and his father, John J. Carreiro (57). The Court further concluded that the evidence placed before the Court was of such an inconclusive and contradictory nature that the invocation of principles of equity in requiring a compromise of the claims of all parties to the action was fit and proper in the premises (58). Therefore the Court concluded that equity and justice would best be served by rendering a judgment under the terms and provisions whereof all of the proceeds of the policies would be equally divided between the four persons, namely, the first and second wives, the daughter, and the father (58). The decision was acceptable to the first wife, the second wife and the

executor of the Last Will and Testament of the assured. The daughter has taken an appeal therefrom.

An additional policy issued by the Prudential Insurance Company of America provided for the payment of \$5,000 to the beneficiary therein named upon the death of the aforesaid decedent, and it was conceded by all parties to the within litigation that the proceeds therefrom should be disposed of in the same manner as the proceeds from the aforesaid New England life insurance policies. The trial Court so held in that case, being civil number 34,472, and thereafter the appellant herein noticed an appeal therefrom, being civil number 14,878, before this Court of Appeals. The appellant moved this Honorable Court for an order staying further proceedings on appeal pending decision of this case and that judgment be entered in the *Prudential* case consistent with the final decision of the *New England* case. The appellees moved to dismiss the appeal by virtue of the aforesaid stipulation of the parties, but this Honorable Court granted a stay upon the condition that the *Prudential* case would be ultimately decided in like manner and upon the same terms as the aforesaid *New England Mutual Life Insurance Company* case.

II.

THE APPEAL IS FRIVOLOUS AND SHOULD BE DISMISSED.

All presumptions are in favor of the validity of the judgment from which the appeal was taken and a duty is cast upon the appellant to clearly show wherein the

trial Court has erred. This the appellant has failed to do. The only specification of error is set forth on page 7 of the appellant's brief and that specification is stated in general terms to be that under the applicable California law the proceeds of the policies are payable to appellant. Upon that statement alone respondents are entitled to a prompt dismissal of this appeal. The case of *Beck v. West Coast Life Insurance Co.*, 38 Cal. (2d) 643, cited by appellant on page 12 of her brief refers to the companion case decided by the United States Court of Appeals for the Ninth Circuit, *Beck v. Downey*, 191 Fed. (2d) 150, which case was ultimately decided on January 18, 1952 and thereafter cited in 198 Fed. (2d) 626. The latter case conclusively demonstrates that California law is not applicable to this particular case. The West Coast Life Insurance Company is a California corporation and the case merely held that by virtue thereof California law is applicable. The life insurance policies involved in this particular litigation, which policies were introduced in evidence, show that the companies were incorporated in Massachusetts and that performance of the contracts, to-wit, payment of any claims thereunder would be made at the home office, namely, Boston, Massachusetts. Therefore, applying the very principles laid down in the *Beck v. Downey* case California law is clearly inapplicable. The *Beck v. Downey* case is clearly against appellant and would result in all the proceeds of the insurance policies being paid to the executor of the Last Will and Testament of the deceased assured. Further comment in regard thereto will be made hereinafter.

The *Thorpe* case cited by appellant is distinguishable upon its facts and in no manner is authority for the proposition that the secondary beneficiary takes. Additional comment concerning this case will be made herein. The major dereliction of duty by the appellant in this case lies in her complete failure to comply with rules of procedure relative to an appeal from a judgment. The sole issue before the trial Court was the intention of the deceased assured in regard to the disposition of the proceeds of policies of life insurance. All the cases upon this subject reiterate the point that each case must be decided upon its own facts. After considerable testimony was adduced at the trial the honorable trial Court concluded that by virtue of many inconsistent statements and actions it was impossible to ascertain and determine the true and correct intention of the deceased assured, but one point had been established, namely, that at the time of his death he had in mind four persons who had been or were at that time close to him, namely, his first wife, his second wife, his daughter, and his father. This was an equitable proceeding and therefore the Court invoked its prerogative in effecting equity and justice by making an equal division of the proceeds between four persons. The appellant's brief is strangely silent about this procedure notwithstanding the fact that it does have precedent. It is respectfully submitted that the appellant has a duty to indicate to the appellate tribunal why the trial Court erred in invoking this equitable principle, wherein the error lay and the citation of authorities substantiating

the aforesaid assertion of error. In the absence thereof it should be conclusively presumed that the appellant acquiesces in this procedure followed by the trial court.

III.

THE CASES CITED BY APPELLANT ARE INAPPLICABLE.

The case of *Beck v. West Coast Life Insurance Co.*, 38 Cal. (2d) 643, is cited by appellant for the proposition that the purported disqualification of the primary beneficiary to take the proceeds of the insurance policies is equivalent to death and therefore the secondary beneficiary automatically takes. The aforesaid case of *Beck v. West Coast Life Insurance Co.*, related to a situation wherein the primary beneficiary murdered the assured and therefore in expressing the public policy of the State of California, the California Supreme Court stated that it would be improper for a person to benefit by his own wrong and that inasmuch as the murderer was convicted of the crime and given life imprisonment this under California law was civil death which in effect was the same as actual death. The strong dissenting opinion, however, pointed out very clearly that the terms and provisions of the policy used the word "death" in the sense of being dead and buried under the ground, that if the insurance company writing the policies intended anything else it certainly would be clearly stated that the primary beneficiary would not take if dead or legally disqualified or incompetent. The *Beck v. West Coast Life In-*

urance Co. is a California case involving a California insurance company wherein performance of the contract would be made in California. The *Beck v. Downey* case decided by this honorable Court and cited at 191 Fed. (2d) 150 and 198 Fed. (2d) 626, arose out of the same factual situation but related to a policy not payable in California. This honorable Court specifically disapproved of the aforesaid theory advocated by the California Supreme Court and refused to follow that case and provided that the proceeds of the policies of life insurance would be payable to the representative of the estate of the deceased assured. This honorable Court said in the case of *Beck v. Downey*, cited at 191 Fed. (2d) 150, at page 152 as follows:

“The words ‘if living’ must be interpreted in their ordinary common sense meaning, namely, that the insured intended the proceeds to go to her mother-in-law if the beneficiary were not alive but was dead and buried. Had there been an intent to have the proceeds go to the contingent beneficiary in the event of the incapacity of the beneficiary while alive to take the proceeds, plain language to that effect could and certainly would have been used. We think the language of the policies was clear and unequivocal. Any disability of the beneficiary such as civil death, assuming it to be applicable to this case, constituted a sanction or penalty imposed upon the beneficiary David A. Downey and affected only his rights and privileges.”

In the case of *Beck v. West Coast Life Insurance Co.* there was excellent reasoning in the dissent of

Justice Edmond M. Spence which stated in part on page 648, et seq., as follows:

“The parties agree that there is no ambiguity in the beneficiary clause of the policy which would justify the admission of extrinsic evidence to explain the meaning of the words used in it. The decisive question therefore is a very narrow one of textual interpretation. In the opinion of Justice Edmonds only by ignoring the clear and unequivocal language of the policy of insurance may the conclusion be reached that the alternative beneficiary is entitled to the proceeds despite the fact that the contingency conditioning her right has never occurred. The decision is placed upon the ground that the policy names the one the insured wished to take if the husband could not. In effect the clause, if living, is enlarged but the provisions of the policy do not express any intention to mean if living and not otherwise disqualified to take. The contract specifically states as the only contingency upon which the beneficiary could not be entitled to its proceeds would be that he would be dead. In the construction of an instrument the office of the judge is simply to ascertain and to declare what is in terms or in substance contained therein, not to insert what has been omitted. (CCP §1858)”

It is therefore clear that upon the authority of the case of *Beck v. Downey*, supra, the entire proceeds of all the insurance policies encompassed herein should be payable to the Wells Fargo Bank as executor of the Last Will and Testament of the deceased assured.

The case of *Thorpe v. Randazzo*, 41 C. (2d) 770 cited by appellant is certainly distinguish-

able factually. The case is cited by appellant for the authority that the primary beneficiary is not entitled to the proceeds of the policies. It is not authority for the proposition that if she is not entitled to the proceeds of the policies the secondary beneficiary is so entitled. As a matter of fact, it is merely authority for the proposition that *if* the primary beneficiary is not entitled to the proceeds of the insurance policies, the personal representative of the estate of the deceased assured is entitled thereto. Consequently, the aforesaid *Thorpe v. Randazzo* case cited by appellant in no way assists her position, but on the contrary is excellent authority for the proposition that the entire proceeds of the policies are payable to the Wells Fargo Bank, as executor of the last will and testament of the deceased assured. However, it is herein asserted that the *Thorpe* case is not applicable to this particular case. In the *Thorpe* case the wife signed both forms of change of beneficiary and the husband actually had one policy changed. He neglected to change the other and there was evidence that the insured thought that the other policy had lapsed. A premium had been tendered and refused by the insurance company. The Court said at page 774:

“The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change *but each case must be decided on its own facts.*”

The Court commented at page 776 on the lapsed policy and the deceased having thought that it was lapsed and assuming that it had been waived and stated:

“It might be reasonably concluded that the deceased decided to proceed no further with the matter (the wife had signed change of beneficiary forms) and that when he was notified by the insurance company that his tendered premium payment would not be accepted in reinstatement of the policy he assumed that the policy was terminated and that it would be an idle act to request the company to make a change of beneficiary.”

The *Thorpe* case can be clearly distinguished upon its facts from the *Carreiro* case. Primarily it cannot be denied that irrespective of the fact that the wife intended to relinquish any interest in and to the insurance policies at any time thereafter the husband had the right to effect a gift of the proceeds back to his wife. Furthermore, it is believed fundamental that in probing for the solution of this particular problem the intent of the deceased assured is of prime importance.

The property settlement agreement contained phraseology indicating acts to be done in the future and privileges accorded which might of necessity require further acts upon the part of the wife. Article VI, provision 7th thereof, of the aforesaid property settlement agreement provides in part as follows:

“The husband *shall receive and be entitled to* the insurance policies hereinafter listed free and clear of any claims of the wife thereto.”

Again, Article VII provides as follows:

“The parties shall at any time or times hereafter make and execute and deliver any and all

such further or other instruments, papers or things as the other of said parties shall require for the purpose of giving full effect to these presents under the covenants, provisions and agreements hereof.”

Again it is clear that both parties contemplated the possibility of future acts or statement required of the wife. On September 6, 1951, more than eleven months prior to the rendition of the final decree of divorce but at a time after the interlocutory decree of divorce the insurance company directed a letter to the deceased assured which stated in part as follows (54):

“If you wish to make any changes in the beneficiary arrangement please advise and forms will be prepared for your signature.”

Shortly thereafter and on November 26, 1951 the deceased assured cashed a \$15,000 policy and called at the office of the insurance company in order to effect this arrangement. Again and on June 25, 1952 he called at the office in person and cashed a \$10,000 policy. At no time while at the insurance company office or otherwise did he comply with the request of the insurance company relative to signing change of beneficiary forms.

The decedent drew a last will and testament on January 3, 1951 which will had not been revoked at the date of his death. In this will the first wife was named as executrix and also a residual legatee and devisee. Notwithstanding the fact that the parties were divorced on August 22, 1952 no change was made in the will. However, the Court specifically found

(55) that this last will and testament of Dr. Carreiro was kept by him together with the life insurance policies in question and the original will of the father of Dr. Carreiro in his office in San Francisco. The Court further found that at a date subsequent to the execution of the aforesaid property settlement agreement and after Dr. Carreiro had divorced Genée Carreiro and after the execution of the last will and testament of Dr. Carreiro, Dr. Carreiro destroyed the original last will and testament of his father but that he did not destroy his own last will and testament.

Dr. Carreiro remarried on December 20, 1952 and the name of his second wife was Irene Carreiro. The doctor died thereafter on January 2, 1954, but despite this second marriage Dr. Carreiro did not effect a revocation of his last will and testament nor make any effort to change the beneficiary forms of his life insurance policies. It is clear therefore that the *Thorpe* case is inapplicable and that the intention of Dr. Carreiro as evidenced by his acts was clearly to effect a gift to his first wife.

The cases of *Jenkins v. Jenkins*, 112 C.A. 403; *Grimm v. Grimm*, 26 Cal. (2d) 173; *Miller v. Miller*, 94 C.A. (2d) 785, and *Shaw v. Board of Administration*, 109 C.A. (2d) 770, support the position of the first wife that notwithstanding a release in a property settlement agreement the proceeds of the policies are payable to her upon the death of the assured if a beneficiary change has not been executed. The strongest support of the first wife's case, however, is probably in the aforesaid *Thorpe v. Randazzo* case which states in part as follows at page 774 thereof:

“The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he has not wished to effect such a change, but each case must be decided on its own facts.”

IV.

CONCLUSION.

Inasmuch as the appellant has failed to comply with her duty of clearly demonstrating to the appellate tribunal wherein the trial Court erred and in addition thereto has predicated her legal reasoning upon a California case which is clearly inapplicable, it is the position of the appellees that the aforesaid appeal should be summarily dismissed by the appellate tribunal without the necessity of an affirmance of the judgment. The appellees respectfully assert that the decision from which the appeal is taken is equitably sound and has great merit and by virtue of their refusal to take an appeal therefrom and also the stipulation in the record, they and each of them, consent to an affirmance of the aforesaid judgment. However, if this Honorable Court believes that the equitable powers of the trial Court would not permit an equal division of the proceeds of the aforesaid policies and that therefore there must be a determination in regard to one of the four claimants, it is clear that by virtue of the cases cited by appellant and the cases cited herein that the entire proceeds of the policies must be paid either to the first wife, Genée

Carreiro, or to the Wells Fargo Bank as executor of the last will and testament of the deceased assured.

Dated, San Francisco, California,
February 24, 1956.

Respectfully submitted,

REGINALD G. HEARN,

*Attorney for Appellee
Genee M. Carreiro.*

WILLIAM T. JOYCE,

*Attorney for Appellee
Irene Carreiro.*

COLIN P. KELLEY,

*Attorney for Appellee
Wells Fargo Bank &
Union Trust Company.*



No. 14,750

IN THE

United States Court of Appeals
For the Ninth Circuit

PHYLLIS BAEKGAARD, formerly Phyllis
Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO,
Individually and as Administratrix of
the Estate of George S. Carreiro, De-
ceased, and WELLS FARGO BANK &
UNION TRUST COMPANY,

Appellees.

APPELLANT'S REPLY BRIEF.

ALFRED JAMES SMITH,

110 Sutter Street, San Francisco 4, California,

Attorney for Appellant.

FILED

MAR 22 1956

PAUL P. O'BRIEN,

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of the case.....	1
Argument	3
(1) California law is applicable.....	4
(2) Appellant is entitled to the proceeds of the policies	7
Conclusion	14

Table of Authorities Cited

Cases	Pages
Beck v. Downey, 191 F. 2d 150, 198 F. 2d 626.....	5
Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 241 P. 2d 544	4, 5, 7, 13
Blair v. New York Life Ins. Co., 40 Cal. App. 2d 494, 104 P. 2d 1075.....	7
Braun v. New York Life Ins. Co., 46 Cal. App. 2d 335, 115 P. 2d 880.....	6
Grimm v. Grimm, 26 Cal. 2d 173, 157 P. 2d 841.....	10
Jenkins v. Jenkins, 112 Cal. App. 402, 297 P. 56.....	9
Meherin v. Meherin, 99 Cal. App. 2d 596, 222 P. 2d 305...	12
Miller v. Miller, 94 Cal. App. 2d 785, 211 P. 2d 357.....	10
Ostroff v. New York Life Ins. Co., 104 F. 2d 986.....	6
Shaw v. Board of Administration, 109 Cal. App. 2d 770, 241 P. 2d 635.....	12
Sullivan v. Union Oil Co., 16 Cal. 2d 229, 105 P. 2d 922...	12
Thorp v. Randazzo, 41 Cal. 2d 770, 246 P. 2d 38.....	10, 12, 13

Codes

Civil Code, Section 1646.....	5
-------------------------------	---

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PHYLLIS BAEKGAARD, formerly Phyllis
Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO,
Individually and as Administratrix of
the Estate of George S. Carreiro, De-
ceased, and WELLS FARGO BANK &
UNION TRUST COMPANY,

Appellees.

APPELLANT'S REPLY BRIEF.

STATEMENT OF THE CASE.

Little need be added on this subject to what was said in our opening brief.

(1) It is true that George Carreiro did not sign a change of beneficiary form. It is *not* true that the insurance company requested him to sign such a form. There was no such request. There was only a statement in the company's letter of September 6, 1951, to the effect that forms would be prepared for his

signature if he wished to change the beneficiaries of his policies.

His failure to sign such forms would be significant if, under the law of California, he was required to sign them in order to remove Genee Carreiro as a beneficiary. His failure to sign them is of no significance, however, if he was not required to sign them (and it is our contention that he was not) in order to remove her as a beneficiary.

(2) It is true that Genee Carreiro was named executrix and residuary legatee in George Carreiro's will and that he did not destroy that will after the execution of the property settlement agreement even though he destroyed his father's will. It is *not* true that, when his will was probated, recognition was given to Genee Carreiro's claims as executrix and residuary legatee.

We would normally consider it improper to bring up the subject of what happened in the probate proceedings since those proceedings are not part of the record in this case. In view of the misleading statements contained in the brief for appellees, however, we have no choice but to submit the following:

The will of George Carreiro was indeed originally offered for probate by Genee Carreiro who, at the same time, petitioned to be appointed as its executrix. Objections to her appointment were filed by Irene Carreiro, however, on the ground that, under the terms of the property settlement agreement, Genee had waived her right to be executrix. After a contested hearing, Genee's petition was denied and Irene

was appointed administratrix with the will annexed. Subsequently, Irene's appointment was revoked and Wells Fargo Bank was appointed executor.

All of the foregoing took place several months before the trial of this case. So far, there has been no determination as to who is entitled to take under the will.

It is not our purpose to argue that the ruling of the probate court (which has long since become final) denying Genee the right to be executrix should be conclusive in this case as to her claim to the proceeds of the policies. Our purpose is only to set the facts straight and to state fairly what has taken place so far in the Superior Court of the State of California, in and for the City and County of San Francisco, in the course of the proceedings (numbered 130295) for the probate of George Carreiro's will.

ARGUMENT.

It is not clear to us why appellees accuse us of being "strangely silent" (page 8 of their brief) about the procedure adopted by the trial judge in invoking so-called principles of equity and dividing the proceeds in four equal shares. We would have thought that we talked about nothing else in our opening brief.

Interestingly enough appellees declare that such a procedure "does have precedent" (page 8) and then proceed to cite none.

Be that as it may, however, we recognize that, even though the trial judge had no power to do what he did, we are in a position to complain about it only if appellant was prejudiced thereby.

She was prejudiced since she was in fact entitled to all of the proceeds.

The question is not whether a trial court has the power in the abstract to invoke equitable principles. The question is whether the trial court had the power to do what it did in this case.

In is our contention that, as a matter of law and regardless of what it chose to believe or disbelieve, the trial court was bound to find in this case that Genee Carreiro waived her claims as a beneficiary and was further bound to hold that, under the rule of *Beck v. West Coast Life Ins. Co.*, 38 Cal. 2d 643, 241 P. 2d 544, appellant, as alternative beneficiary of the policies, was entitled to the proceeds as against the estate of the assured.

It is significant to note that appellees do not deny that that case would be in point if this case were governed by California law. They merely contend that this case is not governed by California law.

As we will now demonstrate, however, this case is governed by California law.

(1) CALIFORNIA LAW IS APPLICABLE.

Appellees point out that the policies all provide that the death benefits should be paid at the com-

pany's home office in Boston, Massachusetts. They accordingly contend that the contracts were to be performed there, that California law is inapplicable and that the case of *Beck v. Downey*, 191 F. 2d 150 and 198 F. 2d 626, rather than that of *Beck v. West Coast Life Ins. Co.*, supra, is controlling.

That contention is untenable.

It is true that, in *Beck v. Downey*, supra, this court refused to apply the law of California. It pointed out that the policies were applied for in Iowa, issued in Indiana and delivered to the assured in Iowa. So far as the place of their performance was concerned, they provided that the death benefits would be paid in Indiana and that the premiums should be paid there. The first premium was in fact paid in Iowa and the assured died before the due date of the second premium.

In other words, no part of the contract was to be performed in California and the case had no connection whatever with that state except that the action was filed there.

Section 1646 of the Civil Code of California provides that "A contract is to be interpreted according to the law and usage of the place where it is to be performed". Under that section, there simply was no basis in that case for applying the law of California.

This, however, is a case in which the contracts were to be performed, in part at least, in California. We could even argue, but need not do so, that, in fact, they were completely performed in California since

the insurance company did not choose to pay the death benefits in Massachusetts but instead deposited them in court in California. In any event, however, the premiums (which, in an earlier case, this court described as "by far the greater number of performances", *Ostroff v. New York Life Ins. Co.*, 104 F. 2d 986, 988) were not only payable but in fact were paid in California¹ and the policies were serviced at the San Francisco office of the company (64-83).

A similar problem was presented in *Braun v. New York Life Ins. Co.*, 46 Cal. App. 2d 335, 115 P. 2d 880. The policy involved in that case was applied for and delivered to the assured in Pennsylvania.² Just as the policy in this case, it provided that the benefits were payable at the company's home office (in New York) and that the premiums could either be paid there or to an authorized agent of the company.

The court held that the policy was to be performed partly in New York and partly in any other place where the premiums were paid and other necessary business transacted. Since the assured had lived in California for at least 8 years before the filing of the action, the court rejected the contention of the insurance company that New York law was applicable (on

¹All of the policies are part of the record in this case (Exhibits G-6, G-7 and G-8). They all contain the standard provision (first paragraph of page 2) making premiums payable either at the home office of the company *or* to an agent of the company.

²In this case, policies Nos. 725936 and 725937 were applied for and presumably delivered in Honolulu. By 1942, when policy No. 1154064 was applied for, George Carreiro had moved to San Francisco. The application for that policy was signed there and the policy was presumably delivered to him there.

the theory that the policy was to be performed in New York) and held instead that it was to be performed in California and that California law was accordingly applicable.

The same result was reached in the earlier case of *Blair v. New York Life Ins. Co.*, 40 Cal. App. 2d 494, 104 P. 2d 1075 (hearing denied). The law of California was held to be applicable in that case to a policy issued by a New York company to a resident of the State of Washington, who, by the time the action arose, had become a resident of California and was paying the premiums there.

Thus, California *was* the place of performance of the policies in this case, the law of California *is* applicable and, appellees' contention to the contrary notwithstanding, *Beck v. West Coast Life Ins. Co.*, *supra*, *is* controlling.

(2) APPELLANT IS ENTITLED TO THE PROCEEDS
OF THE POLICIES.

We agree with appellees that the sole issue before the trial court was that of George Carreiro's intention with respect to the disposition of the proceeds of the policies. We also agree that each case of this type is to be decided on its own facts. This does not mean, however, that anything goes.

The facts upon which we rely are written facts contained in a property settlement agreement. It is our contention that the agreement involved in this case was as broad and all inclusive as the agreements which have previously been held to amount to a

waiver of a beneficiary's claim under an insurance policy.

Hence, the issue can and must be decided as a matter of law³ (particularly since no other creditable evidence was presented to the trial judge).

The allegedly inconsistent statements and actions of George Carreiro to which appellees refer in their brief (such as his failure to sign change of beneficiary forms or his failure to destroy his will) were all made or all taken *after* the execution of the property settlement agreement. Hence, the trial court's refusal to believe any of the evidence on the subject only means that it could not determine whether George Carreiro made further changes of beneficiaries *after the change resulting from the property settlement agreement*.

Appellees argue that, irrespective of the fact that a wife relinquished all her interest in and claims to insurance policies on the life of her husband, the husband has the right thereafter to make a gift of the proceeds to her. With this we again agree.

The point is, however, that, in this case, the trial court found the evidence to be inconclusive on the subject of whether George Carreiro made a gift of the proceeds back to Genee. Hence, the contention upon which appellees primarily rely (that George Carreiro made such a gift to her) is clearly untenable.

³By declaring the question to be one of fact, the Supreme Court of California certainly did not intend to allow different trial courts to construe substantially similar property settlement agreements in different or opposite ways.

It might be well to note at this point the inconsistency in the position of appellees who argue at the same time that George Carreiro made a gift of the policies back to Genee (which means that she had previously waived her claims thereto) *and* that the agreement did not amount to a waiver by Genee of her rights to and claims under the policies. We assume that, at the time of the oral argument, appellees will tell this court which of the two contentions they actually rely upon.

Appellees cite four cases in support of the proposition that, notwithstanding a release in a property settlement agreement, the proceeds of life insurance policies are payable to the wife of the assured if he does not execute a change of beneficiary form. Those cases are all distinguishable.

In *Jenkins v. Jenkins*, 112 Cal. App. 402, 297 P. 56, the agreement listed all the property of the parties upon which it was to operate and specifically provided that, as to unlisted property, it should not be binding upon the wife. The policy involved in the action was not included in the list. Hence, the court had no difficulty in holding that the wife had not relinquished her claim as a beneficiary thereof.

In the course of its opinion, the court pointed out that, after their divorce, the husband had never exercised his power to change the beneficiary of the policy. This does not mean that a formal change of beneficiary is necessary in a case in which the divorced wife waived her claim as a beneficiary by a property settlement agreement. It only means that, in a case

in which there was no waiver, the husband must execute a formal change of beneficiary if he no longer wishes his former wife to receive the proceeds of the policies.

Grimm v. Grimm, 26 Cal. 2d 173, 157 P. 2d 841, is fully analyzed and explained in the excerpt from *Thorp v. Randazzo*, 41 Cal. 2d 770, 264 P. 2d 38, which is included in our opening brief. The agreement in that case, which was *not* as all inclusive as the agreement in this case, was held not to constitute an immediate release of the wife's claim as a beneficiary under the policies.

In *Miller v. Miller*, 94 Cal. App. 2d 785, 211 P. 2d 357, the court again held that the agreement was not broad enough to cover the claim of the wife as a beneficiary under certain insurance policies. The policies were mentioned neither in the agreement nor in the divorce action that followed the agreement. Nor did the agreement purport to cover all of the property of the parties. The following excerpt from the opinion makes it clear that, although the court held in that case that the wife had not waived her claim as a beneficiary, it would have held in this case that there had been a waiver:

"The agreement here in question is somewhat unusual. The preamble states that the parties desire to settle and adjust their property rights, interests and claims against each other. Thereafter, it is agreed that each conveys and releases to the other all his right and interest in and to certain specified items of property. It is not stated that this is all of their property, no men-

tion is made of these insurance policies or of any community property, it is not provided that the wife takes the property assigned to her in full satisfaction of all her rights and there is no provision that the property not mentioned shall belong to the husband. It is not specifically stated that these policies, in which each had a community interest, should become the separate property of the husband and there is no provision that no rights should accrue to the wife even though she remained the beneficiary at the time of the husband's death. The final paragraph consists of but one sentence, and provides that each party agrees that he will not claim from the other and that he thereby waives 'as though the marital relationship had never existed' certain rights against the other. These rights are specifically named and they are the right 'for support, alimony, court costs or attorney's fees in any action affecting the marital duties or relationship and any right to inherit from, to claim a probate homestead upon or to administer the estate of the other.' This language was not only general, but was used in the same sentence, and as a part of, this definite provision respecting these specified marital duties and rights only. Not only is that the only waiver but it is equally made by each of the parties. There is no waiver of any interest in any property which was not mentioned, each waives the same things, and the wife waives no more than does the husband. There is nothing to indicate that the rights of the parties in these insurance policies were not to remain just as they were, the husband having the right to certain benefits if he reached a certain age and the wife, as beneficiary, having the right to any

proceeds upon his death. In our opinion, it does not clearly appear from the language of this agreement that the parties intended it as covering and disposing of their respective interests in these policies, or that it was intended to deprive the wife of the right to take as beneficiary thereunder."

94 Cal. App. 2d 790-1.

It should also be noted that, in that case, the husband handed the policies to his wife after the execution of the agreement and told her that they belonged to her and that, two days later, when she offered to return them to him, he refused to take them stating again that they belonged to her.

In *Shaw v. Board of Administration*, 109 Cal. App. 2d 770, 241 P. 2d 635, no property settlement agreement was involved at all. In fact, none was executed by the parties. The case merely holds that, in an action for divorce in which the pleadings made no mention of a certain policy, a decree which does not mention it either has no effect upon the wife's rights as a beneficiary thereunder.

The cases which the trial court should have followed are the cases in which an all-inclusive property settlement agreement (such as the one involved in this case) was held to amount to a waiver of the wife's claim as a beneficiary. *Thorp v. Randazzo*, 41 Cal. 2d 770, 246 P. 2d 38, is one of them. *Sullivan v. Union Oil Co.*, 16 Cal. 2d 229, 105 P. 2d 922, is another and so is *Meherin v. Meherin*, 99 Cal. App. 2d 596, 222 P. 2d 305. The latter two cases are dis-

cussed at length in the excerpt from *Thorp v. Randazzo*, supra, which is quoted in the appendix to our opening brief. It would unnecessarily lengthen this brief for us to discuss them here.

Appellees argue that *Thorp v. Randazzo*, supra, “in no manner is authority for the proposition that the secondary beneficiary takes” (page 8 of their brief). In this, we concur. There was no secondary or alternative beneficiary in the *Thorp* case.

We did not cite that case in support of that proposition. We cited it in support of the proposition that the property settlement agreement amounted to a waiver of Genee’s rights and that, as a result of that waiver, the policies became payable to whoever was next in line. In the *Thorp* case, the estate of the assured happened to be next in line. In this case, appellant is.

We fully realized that we would need further authority in support of the proposition that, as between the estate of the assured and the secondary beneficiary, the secondary beneficiary should be preferred. We found such authority in *Beck v. West Coast Life Ins. Co.*, supra.

Although appellees contend that we did, we did not cite that case “for the proposition that the purported disqualification of the primary beneficiary . . . is equivalent to death” (page 9 of their brief). That is not what the case decides.

It does hold, however, that, when a choice must be made between the alternative beneficiary and the es-

tate of the assured because the primary beneficiary is precluded from taking, the alternative beneficiary should be preferred since the assured has made it clear that any interest that his estate might have in the proceeds should be subordinate to the interest of the alternative beneficiary.

Appellees place strong reliance upon the dissenting opinion in that case. Unfortunately for them, however, it is the majority that counts.

CONCLUSION.

Under the law of California, which is controlling, Genee Carreiro must be held to have waived her rights to the proceeds. As between George Carreiro's estate and his daughter, his daughter is entitled to preference. The judgment should accordingly be reversed with directions to the trial court to award the entire proceeds to appellant.

Dated, San Francisco, California,
March 21, 1956.

Respectfully submitted,

ALFRED JAMES SMITH,

Attorney for Appellant.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

JAY G. SYKES
Attorney for Appellant

Office and Post Office Address:
1708 Smith Tower
Seattle 4, Washington

MODERN CITY PRINTING, SEATTLE, WASHINGTON—7/21/55—45 COPIES

FILED

JUL 22 1955

PAUL P. O'BRIEN, CLERK



IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

JAY G. SYKES
Attorney for Appellant

Office and Post Office Address:
1708 Smith Tower
Seattle 4, Washington



INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF CASE	2
SPECIFICATION OF ERRORS	4
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	11

CASES CITED

<i>Alexander v. United States</i> , 182 Fed. 2d 480	8, 9
<i>Blau v. United States</i> , 340 U.S. 159	8
<i>Emspak v. United States</i> , 349 U.S. 190	6, 7, 9
<i>Hoffman v. United States</i> , 341 U.S. 479	5, 6, 8, 9
<i>Kasinowitz v. United States</i> , 181 Fed. 2d 632	8, 9
<i>Quinn v. United States</i> , 349 U.S. 155	9
<i>United States v. Burr</i> , 25 Fed. Cas. 40, No. 14, 692 (e)	5, 6, 9
<i>United States v. Weissman</i> , 111 Fed. 2d 265	5

STATUTES CITED

Section 192, Title 2, U.S.C.	2, 3
Section 1505, Title 18, U.S.C.	3
Section 3231, Title 18, U.S.C.	1
Section 1291, Title 28, U.S.C.	1



IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction was conferred on the United States District Court by Section 3231, Title 18, U. S. C. Jurisdiction for this appeal is conferred by Section 1291, Title 28, U. S. C.

STATUTE INVOLVED

Section 192, Title 2, U. S. C. provides that:

“Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisoned in a common jail for not less than one month nor more than twelve months.”

QUESTIONS PRESENTED

(While the appellant raised eight points to be relied upon in appeal in his Statements of Points to Be Relied Upon in Appeal, he now raises only the following question:)

1. Whether the appellant validly asserted his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States in response to the question asked of him by the subcommittee.

STATEMENT OF CASE

On June 16, 1954, at Seattle, Washington, the appellant appeared as a witness before the subcommittee of the Committee on Un-American Activities of the House

of Representatives. The subcommittee was investigating the extent and nature of Communist Party activity in Seattle. Before the appellant appeared as a witness, he had been named by another witness as having been a member of the Communist Party.

The appellant was asked various questions by the subcommittee. Among these questions was the following: "How soon after that (referring to the period in which he lived in Bellingham) was it that you moved to Seattle?" The appellant refused to answer this question, invoking his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. For this and other refusals to answer, appellant was indicted and tried on five counts of violation of Section 192, Title 2, U. S. C. and on one count of violation of Section 1505, Title 18, U.S.C. All counts but the one based on the question above were dismissed by the Court below.

The Court below ruled that there was nothing about the question, or about the surrounding circumstances, to indicate that an answer to the question would have incriminated the appellant, or would have afforded a link of any kind in a criminal prosecution.

The Court then ruled, as a matter of law, that the appellant's answer to the question was not privileged

under the Fifth Amendment, and the jury convicted him for his refusal to answer. Notice of appeal was duly and timely filed in this Court.

SPECIFICATION OF ERRORS

1.

The Court below erred in ruling that there was nothing about the question to indicate that an answer thereto would have incriminated him directly or indirectly, or would have afforded a link of any kind in a criminal prosecution.

2.

The Court below erred in ruling that appellant's answer to the question was not privileged under the Fifth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

The appellant validly asserted the privilege against self-incrimination under the Fifth Amendment. Under the circumstances and in the setting in which the question was asked, in view of the admitted purpose of the question, in view of the subject matter that the subcommittee was investigating and in view of what preceded the asking of the question (see ARGUMENT below), the appellant had reasonable grounds to apprehend that an answer to the question would tend to incriminate him. Specifically, he had reasonable grounds

to apprehend that an answer to the question might have afforded an important link in a chain of evidence to convict appellant of a violation of a Federal criminal statute, the Smith Act.

ARGUMENT

To determine whether the privilege was properly invoked, the setting in which this question was asked must be considered. The privilege of the Fifth Amendment may not be destroyed by singling out one question and claiming that question itself did not seek self-incriminating evidence. It is established that where a series of questions constitute part of a single line of inquiry, the availability of the privilege against all questions is determined by the general nature of the line of inquiry. "We are to take the question," said Judge Learned Hand in *U. S. v. Weissman*, 111 Fed. 2d 265, "in its setting including the other questions and the information of which we may reasonably infer the prosecution has possession."

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, 341 U.S. 479, at page 486. In *United States v. Burr*, 25 Fed. Cas.

40, No. 14, 692 (e), Chief Justice Marshall had enunciated a similar test: "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish *any one* of them against himself." The rules enunciated by the *Hoffman* and *Burr* cases were expressly adopted and approved by the Supreme Court in the recent case of *Emspak v. United States*, 349 U.S. 190, decided May 23, 1955.

What was the setting—as established by the record—in which the question was asked in the instant case? Prior to the appellant's appearance as a witness before the subcommittee, the appellant had been identified by another witness as a member of the Communist Party. (Transcript of Proceedings, P. 14).

According to the witness for the appellee, Mr. Travenner, counsel for the subcommittee, the subcommittee was investigating Communist Party activity in the Seattle area. (Tr. 18, 34). And all questions asked of appellant were directed towards this single line of inquiry. The stated purpose of the particular question was two-fold: to ascertain when the appellant lived in Seattle in order to determine what *knowledge* he had of Communist Party activity and influence in that area (Tr. 18); and to identify the appellant as the George Starkovich previously named as a Communist

(Tr. 14). Mr. Tavenner testified in the trial below, and was specific about it, that the subcommittee was, in interrogating the appellant, seeking to learn what he knew of Communist Party activity in Seattle (Tr. 31). The appellant told the subcommittee that he lived in Bellingham in 1950 (Tr. 18), but the subcommittee was interested in Communist activity, *not* in Bellingham, but in Seattle (Tr. 31). It was, therefore, the obvious and stated purpose of the question, to locate the appellant in Seattle so as to establish whether he had knowledge of Communist activity in Seattle.

In view of the foregoing setting, it is obvious—in light of the recent *Emspak* holding—that for appellant to answer this question, he would have afforded his questioners a substantial link in a chain of evidence necessary to convict appellant of a violation of the Smith Act, under which membership in the Communist Party is a vital, almost conclusive, element. For appellant to have answered that he moved to Seattle and to pin-point the date of his moving might also have substantiated the charge previously made by the witness who had named appellant as a Communist, since there was some question as to whether appellant was the same person so named as a Communist.

The “link in the chain” is obvious. For appellant to testify that he did move to Seattle on a particular date then establishes the possibility that appellant had

knowledge of Communist activity in Seattle—and knowledge of such activity was just what the subcommittee was inquiring about.

In the *Hoffman* case, *supra*, the Supreme Court emphasized the necessity both for excluding all possibility of incrimination and for taking into account all the circumstances before a claim of privilege is denied. It held that such a claim must be respected unless it is “not *perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers *cannot possibly* have such tendency to incriminate.” (Italics in original.)

Upon the foregoing principles, it is now conclusively established that answers are privilege concerning Communist membership, activity, affiliation or association with the Communist Party. (*Blau v. United States*, 340 U.S. 159). Even before the *Blau* case, it was similarly well established that the privilege supports a refusal to testify as to attendance at Communist Party meetings, *knowledge* of its affairs, and acquaintance with persons thought to be Communists (*Alexander v. United States*, 181 Fed. 2d 480; *Kasinowitz v. United States*, 181 Fed. 2d 632).

The question, then, was asked the appellant in the instant case, being so directly linked with *knowledge* of Communist Party affairs and activities, it seems clear than an answer to the question—in the words of

the *Hoffman* case (supra)—“might be dangerous because injurious disclosure could result.”

If there was any doubt about the principle of the privilege against self-incrimination, and when it can be validly invoked, these doubts have been erased by the recent holdings in the *Emspak* case (supra) and in *Quinn v. United States*, 349 U.S. 155, decided the same day. In the *Emspak* case, the Court reversed a conviction for refusal to answer some 58 questions concerning Emspak's associations posed to petitioner by a subcommittee such as interrogated appellant in the instant case. Chief Justice Warren, writing the majority opinion, followed the principles in *Hoffman*, *Burr*, *Alexander* and *Kasinowitz*. The Court said, “If an answer to a question may tend to be incriminatory, a witness is not deprived of the protection of the privilege merely because the witness if subsequently prosecuted could perhaps refute any inference of guilt.”

Of particular significance in *Emspak* is the dissenting opinion of Mr. Justice Harlan who vigorously opposed the majority on the question of reasonable apprehension. His very dissent indicates the broad scope of the majority decision in determining whether the answer to a particular question might be incriminatory. But more important is Harlan's definition of the problem as he saw it. “What I do submit is that the privilege should not be available when the facts have been

sufficiently developed at the time the claim of privilege is made so that it is plain that no possible answer to the question put to the witness could rationally tend to prove his guilt or supply the prosecution with *leads* to evidence against him." (Italics mine.) Even under Harlan's definition, I submit that the decision of the lower Court should be reversed. For there can hardly be any doubt but that any answer to the question as to when appellant moved to Seattle would supply the prosecution with a "*lead* to evidence against him." No further evidence concerning reasonable apprehension was necessary since the burden was on the prosecution to prove that an answer could not have possibly incriminated him, and that the prosecution did not do.

The trial judge below should have ruled, as a matter of law, that under the circumstances described above, the appellant had reasonable apprehension that a response to the question might tend to incriminate him, and therefore, that he had validly invoked the Fifth Amendment. The Court should have dismissed that count of the indictment based on the said question.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the Court below be reversed.

Respectfully submitted,

JAY G. SYKES

Attorney for Appellant.

1890

1890

1890

1890

1890

1890

1890

1890

1890

1890

1890

1890

1890

1890

1890

1890

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

RICHARD D. HARRIS
Assistant United States Attorney
Attorneys for Appellee

Office and Post Office Address:
1012 United States Court House
Seattle 4, Washington

FILED

BALLARD NEWS, SEATTLE, WASHINGTON — 8/3/1955 — 45 COPIES

AUG 15 1955

PAUL P. O'BRIEN, CLERK



IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

RICHARD D. HARRIS
Assistant United States Attorney
Attorneys for Appellee

Office and Post Office Address:
1012 United States Court House
Seattle 4, Washington



INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE.....	1
ARGUMENT	3
CONCLUSION	21

CASES CITED

<i>Alexander v. United States</i> , 181 F. 2d 480.....	11
<i>Bart v. United States</i> , 349 U.S. 219.....	15, 18
<i>Blau v. United States</i> , 340 U.S. 159.....	14
<i>Brown v. Walker</i> , 161 U.S. 591.....	15
<i>In re Chapman</i> , 166 U.S. 661.....	4
<i>Doran v. United States</i> , 181 F. 2d 489.....	13
<i>Emspak v. United States</i> , 349 U.S. 190.....	6, 8, 15
<i>Healey v. United States</i> , 186 F. 2d 164.....	11
<i>Heike v. United States</i> , 227 U.S. 131.....	15
<i>Hoffman v. United States</i> , 341 U.S. 479.....	13
<i>Kasinowitz v. United States</i> , 181 F. 2d 632.....	12
<i>In re Lemon</i> , 59 P. 2d 213 (Cal. 1936).....	9
<i>Mason v. United States</i> , 244 U.S. 362.....	14
<i>Quinn v. United States</i> , 349 U.S. 155, 203 F. 2d 20..	4, 15, 16
<i>Rogers v. United States</i> , 340 U.S. 367.....	15
<i>United States v. Burr</i> , 25 Fed. Cas. 38.....	19

STATUTES CITED

United States Code, Title 2, Section 192.....	3
---	---

TEXT BOOKS

Page

Wigmore, Vol. 8, Evidence, p. 317..... 20

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The appellee adopts the statement of jurisdiction set forth in the appellant's brief.

STATEMENT OF THE CASE

The statement of facts in the appellant's brief is rather limited and for that reason the appellee

deems it necessary to outline the facts in more detail.

The appellant, with the permission of the Court, is proceeding with a typewritten record, therefore, it may be necessary for convenience sake to set forth more quotations from the evidence than would be required if there were a printed record.

The appellant appeared pursuant to a valid subpoena on June 16, 1954 at Seattle, Washington before the Committee on Un-American Activities of the House of Representatives. All of his testimony before said committee appears in Plaintiff's Exhibit 1, commencing on page 4 to page 15.

The appellant was asked questions and having refused to answer certain of them, he was held in contempt of the House of Representatives of the United States. Thereafter the United States Attorney in the Western District of Washington was directed by the Speaker of the House to proceed according to law. The matter was presented to a grand jury and an indictment in six counts was returned. On motion by the appellant prior to trial, Count VI was dismissed by the court. The case went to trial on March 14, 1955. Only one witness testified, he was Mr. Tavenner, Counsel for the committee. After the jury was selected, the appellant wished the trial court to rule on the questions of pertinency and claim of privilege

in the absence of the jury. This was done and the court, after hearing testimony and argument, dismissed Counts II, III, IV and V. Thereafter, trial was had before the jury on Count I. The appellant did not testify and a verdict of guilty was returned on March 15, 1955. On March 25, 1955, the appellant was sentenced to six months imprisonment and fined \$250.00 on Count I. Notice of appeal was timely filed together with a Statement of Points to be Relied Upon on Appeal which consisted of eight separate points. However, in appellant's brief, only one point is presented to this court for determination and that relates only to the claim of privilege. The appellee, therefore, will confine its brief to answering that argument only as it is deemed that the appellant has waived the remaining points by failing to argue them.

ARGUMENT

The appellant was tried and convicted in district court upon a charge of violating the provisions of Title 2, U.S.C. Section 192 which provides:

§ 192. Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses

to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100, and imprisonment in a common jail for not less than one month nor more than twelve months.

The above section is derived from the Act of January 24, 1857, 11 Stat. 155, amended 12 Stat. 333, and 52 Stat. 942. Except for immaterial changes and additions, this section is substantially the same as the original Act. The first indictment under the Act was in 1894 (*In re Chapman*, 166 U.S. 661). Merely for historical interest, 113 citations for contempt were voted by Congress during the years 1857 to 1949, while in the period of 1950 to June 1952, 117 citations were voted. (*Quinn v. United States*, 203 F. 2d 20, 37, C.A. D.C.).

The appellee asserts that no material errors of law occurred and that the evidence supports beyond a reasonable doubt the conviction on Count I wherein the appellant refused to answer the following question:

“How soon after that (referred to the period in which he lived in Bellingham) was it that you moved to Seattle?”

That the appellant refused to answer said question on the following basis:

“In answer to that question, because one question leads to another, I am going to invoke, under

my privileges not to testify against myself, the fifth amendment in refusing to answer that question.”

Said claim of privilege was not a valid ground for the appellant's refusal to answer the question.

It should be pointed out that appellant, immediately after the question was asked and prior to stating the grounds for refusal indicated above, expressed the following which appears at the bottom of page 5, Plaintiff's Exhibit 1:

“Mr. Starkovich: *I don't remember*. I will discuss that with my attorney, too. (Italics supplied) (At this point Mr. Starkovich conferred with Mr. Hatten.)”

By way of explanation Mr. Hatten, an attorney, was counsel for the appellant during the Committee hearing on June 16, 1954. The above quotation is pointed up to show that the appellant's refusal was not claimed on a basis that his answer would incriminate him, because if we view the record of his testimony, he didn't remember the answer to the question contained in Count I, or at least he so stated. Failure to remember the answer to a question is not grounds for invoking the privilege under the Fifth Amendment of the Constitution.

The appellant refused to answer said question on his claim of privilege under the Fifth Amendment

as indicated by the following which appears at the top of page 6 in Plaintiff's Exhibit 1:

"Mr. Starkovich: Have you placed a question before me?"

Mr. Velde: I am directing you to answer, having given you that advice.

(At this point Mr. Starkovich conferred with Mr. Hatten.)

Mr. Starkovich: Again I want to state that it is a violation of my rights under the American Constitution in asking that question, and I am going to refuse under my privileges, under my privileges not to testify against myself, invoking the fifth amendment."

Appellant only raises the question as to privilege. The standard to be guided by was announced in *Emspak v. United States*, 349 U.S. 190, at p. 197:

* * * The protection of the Self-Incrimination Clause is not limited to admissions that "would subject (a witness) to criminal prosecution"; for this Court has repeatedly held that, "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial" and that the privilege also extends to admissions that may only tend to incriminate. (The Court cites *Blau v. United States*, 340 U.S. 159, 161; *Hoffman v. United States*, 341 U.S. 479, at 486-487; *United States v. Burr*, 25 Fed. Cas. at 40-41, No. 14,692e.)

From the question itself, together with all the evidence in the case, there is not the slightest suspicion that an answer to the question in Count I would

“tend to incriminate.” In passing it may be noted that appellant’s departure from Bellingham was not knowledge personal to himself alone, for it must have been known to many others in the community, and it is inconceivable that an answer would have incriminated him. Neither does the appellant argue in his brief how an answer to *that* question could tend to incriminate appellant, except to guess that to pin-point the date of moving to Seattle might further identify appellant as a Communist.

The appellant gave the following answers to certain questions prior to being asked the question in Count I:

Mr. Tavenner: Where do you now reside?

Mr. Starkovich: I will find out my legal rights on that from my attorney. (At this point Mr. Starkovich conferred with Mr. Hatten.)

Mr. Starkovich: If I remember my subpoena correctly, my address was on that, which you have because you sent it to me; and, further than that, I will say I live in Seattle, Washington. I protest answering this question any further.

Mr. Tavenner: How long have you lived in Seattle, Washington?

Mr. Starkovich: I will discuss that point with my attorney. (At this point Mr. Starkovich conferred with Mr. Hatten.)

Mr. Starkovich: I have lived here a couple of years, approximately.

Mr. Tavenner: How many years?

Mr. Starkovich: A couple of years, approximately.

* * *

Mr. Tavenner: Where did you live in 1950?

Mr. Starkovich: That is the same question, isn't it? Or is it worded differently?

Mr. Tavenner: Just answer the question. Where did you live in 1950?

Mr. Starkovich: Same answer as previously stated.

* * *

Mr. Velde: Yes, the Chair concurs. You are directed to answer the question.

(At this point Mr. Starkovich conferred with Mr. Hatten.)

Mr. Starkovich: Under protest, because my attorney says that I can answer that question without infringing on my rights as an American, I will say that I was — I mean I was born in Bellingham, naturally, but I lived, as I can best remember, all of 1950 in Bellingham, Washington.

The preceding colloquy is unambiguous and warrants the conclusion that there was a waiver. The *Emspak* case, *supra*, still recognizes that proposition, even though the Court held in that case that no finding of waiver was warranted.

No case cited by appellant, nor a detailed search by appellee could be located that would establish a precedent for invoking the rule that appellant is urg-

ing on this Court, to the effect that anyone identified as a Communist is privileged under the Fifth Amendment to refuse to answer any question propounded to him by a Congressional Committee. Certainly a witness must answer all routine questions. For it must be pointed out that there is a definite distinction between a witness and a defendant. Obviously a defendant can refuse to be a witness and thereby refuse to answer *any* question, on the general principle that he need not be a witness against himself. While a witness, other than a defendant, may refuse to answer *only* those questions which tend to incriminate him.¹ To hold as the appellant argues would obliterate this distinction. The appellant was appearing before the Congressional Committee as a witness. Actually a witness before a Congressional Committee and one before a grand jury are certainly in different categories. This other distinction has not been commented on in the cases dealing with this point, but it is significant because several of the cases have gone to a considerable extent to sustain the privilege where the witness appeared before a grand jury. Certainly the apprehension of a witness before a grand jury would be greater than it would be before a Congressional

¹ For a scholarly discussion on this distinction note Justice Spence decision in *In re Lemon*, 59 P. 2d 213 (Cal. 1936).

ant for a federal crime. (Patricia) *Blau v. United States*, 340 U.S. 159 (1950)."

However, the Supreme Court does not stop there but continues with the following language:

"But this protection *must* be confined to instances where the witness has *reasonable cause* to apprehend danger from a direct answer. *Mason v. United States*, 244 U.S. 362, 365 (1917), and cases cited. The witness *is not* exonerated from answering *merely* because he declares that in so doing he would incriminate himself — *his say-so does not* of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified. *Rogers v. United States*, 340 U.S. 367 (1951) * * * The trial judge in appraising the claim 'must be governed as much by his personal perceptions of the peculiarities of the case as by the facts actually in evidence.' See Taft, J., in *Ex parte Irvine*, 74 F. 954, 960 (C.C.S.D. Ohio, 1896). (Italics supplied).

The Supreme Court then looked at the "setting" and concluded that it was not perfectly clear that the answers could not possibly incriminate the petitioner.

In determining the possibility of incrimination the trial judge is in the best position to "size up" the situation and his decision should not be disturbed unless there is an abuse of discretion. In *Mason v. United States*, 244 U.S. 362, 366, the Court stated:

"Ordinarily, he (the trial judge) is in a much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified

by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere."

This same determination by the court is referred to in *Rogers v. United States*, 340 U.S. 367, 374:

"* * * As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further incrimination."

See also *Heike v. United States*, 227 U.S. 131, 144, and *Brown v. Walker*, 161 U.S. 591, 600.

The trial court was cognizant of this rule throughout the trial below and gave the appellant the benefit of the doubt in each instance as indicated by the dismissal of Counts II through VI which contained some of the following questions: Count II—Did you travel abroad in 1950? Count III—I hand you a photostatic copy of a passport application issued November 6, 1950 and I will ask you to examine it and state whether or not the signature appearing on the second page is your signature. Count IV—Is the photograph appearing on the second page a photograph of you? Counts V and VI did not deal with specific questions.

On May 23, 1955 the Supreme Court decided *Quinn v. United States*, 349 U.S. 155; *Emspak v. United States*, 349 U.S. 190; *Bart v. United States*, 349

U.S. 219. All three of these cases arose out of hearings before the Committee on Un-American Activities of the House of Representatives. The appellant seems to base his entire argument on the holdings in these cases. What then do these cases specifically hold?

In the *Quinn* case, *supra*, the petitioner Quinn was called as a witness before the Committee after a witness by the name of Thomas J. Fitzpatrick. Fitzpatrick refused to answer certain questions on the basis of the First and Fifth Amendments. Quinn being subsequently called as a witness, refused to answer, adopting as his own grounds those relied upon by Fitzpatrick. The lower court held that a witness (Quinn) may not incorporate the position of another witness (Fitzpatrick). The Circuit Court reversed, holding however, that a witness can incorporate the position of another, but that the claim must be *clear*, and ordered a new trial for that determination. Quinn petitioned for certiorari from the order granting a new trial. Mr. Chief Justice Warren who wrote the majority opinions in all three cases stated in the *Quinn* case that—(1) the petitioner's references to Fitzpatrick's grounds were sufficient to invoke the privilege to a question concerning petitioner's membership in the Communist Party; (2) that "unless the witness is clearly apprised that the Committee demands his answer notwithstanding his objections, there can be

no conviction under Sec. 192 for refusal to answer that question" (language appearing at page 166 of the opinion). Those were the only two grounds for reversing the conviction, neither of which is involved in the instant case.

In the *Emspak* case, *supra*, the petitioner Emspak was asked 239 questions. He refused to answer 68 on the basis of the First and Fifth Amendments. Emspak was tried on all 68 refusals. Of those 68 questions, 58 related to whether or not the petitioner was acquainted with certain named individuals and whether or not those individuals had ever held official positions in the union; two questions dealt with alleged membership in Communist front organizations; and eight questions dealt with petitioner's alleged Communist Party membership and activity. The Government in that case conceded that all 68 questions were of an incriminating character. With that concession and with the nature of the questions propounded, together with the setting, where both Communist front organizations had previously been cited by the Committee as Communist-front organizations, and where each of the named individuals had previously been charged with having Communist affiliations, the Court held at page 201:

"If an answer to a question may tend to be incriminatory, a witness is not deprived of the

protection of the privilege merely because the witness, if subsequently prosecuted could perhaps refute any inference of guilt arising from the answer."

A second ground for reversing the conviction was announced by Mr. Chief Justice Warren to the effect that the Committee never overruled petitioner's objection based on the Fifth Amendment and never directed him to answer, therefore, "without such appraisal there is lacking the element of deliberateness necessary for a conviction under Section 192 for a refusal to answer." (Found at page 202.)

In the *Bart* case, *supra*, the petitioner Bart, when called before the Committee, was general manager of the Freedom of the Press Co., Inc., which publishes the Daily Worker, and of the Daily Worker itself, both being Communist Party organs. The District Court found petitioner guilty of eight counts (questions). The Circuit Court upheld the convictions as to five counts. Mr. Chief Justice Warren announced the issue before the Court at page 222:

"Therefore, the issue before us is, upon the record as it stood at the completion of the hearing, *whether petitioner was apprised of the Committee's disposition of his objections.*"

(Italics supplied.)

Bart's objections were pertinency and self-incrimination. At no time did the Committee directly over-

rule his objections, nor did it indirectly inform Bart of the Committee's position through a specific direction to answer. Mr. Chief Justice Warren stated at page 223:

"Because of the consistent failure to advise the witness of the Committee's position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with the Committee ruling. Because of this defect in *laying the foundation* for a prosecution under Section 192, petitioner's conviction cannot stand under the criteria set forth more fully in *Quinn v. United States, supra.*" (Italics supplied.)

None of the announced decisions are in conflict with the trial court's holding in the instant case, and actually they bolster the position because the Committee has the right to call witnesses before it and ask all but incriminating questions. As stated by Mr. Chief Justice Marshall in *United States v. Burr*, 25 Fed. Cas. 38, 39 (1807):

"When two principles come in conflict with each other, the court must give them both a reasonable construction, *so as to preserve them both to a reasonable extent.* The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, *can neither of them be entirely disregarded.*"

(Italics supplied.)

Also in Wigmore, Vol. 8, Evidence, p. 317, wherein this privilege is discussed, he states:

“In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish.”

Had the Supreme Court in the *Quinn*, et al cases, announced that the Committee could not ask any questions of a witness properly before it, then and only then would these later three cases be authority for appellant's position. But the main proposition advanced is that the Committee must “lay the proper foundation” for prosecution under Section 192 and not leave the witness in the position of speculation as to his possible violation of the section.

The proper foundation was laid in the instant case as indicated by the following quotation from Plaintiff's Exhibit 1, page 6, (top) as it applied to the question under discussion:

“Mr. Velde: You are directed to answer that question.”

In fact the Committee uniformly directed the appellant to answer after each refusal.

The appeal in this case can well present the question: Can a witness refuse to even give his name and address, if called as a witness before a Congressional

Committee hearing if he claims the privilege? To sustain the appellant it would call for an affirmative answer to that question, and make Congressional hearings a useless and wasteful act.

CONCLUSION

Even though the decision in the lower court was arrived at on March 15, 1955 before the recent opinions of the Supreme Court of May 23, 1955, they are in harmony with each other and no basis appears in said recent opinions for reversing the conviction in the instant case, and the same should in all respects be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

RICHARD D. HARRIS
Assistant United States Attorney



No. 14,752

IN THE

United States Court of Appeals
For the Ninth Circuit

AZ DIN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

DUARD F. GEIS,

Williams, California,

PIERCE & BROWN,

FRED PIERCE,

BENJAMIN H. BROWN,

1023 H Street, Sacramento 14, California,

Attorneys for Appellant.

FILED

OCT 18 1955

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of pleadings and facts disclosing basis upon which it is contended that District Court had jurisdiction and this court has jurisdiction to review judgment in question	1
Specification of errors	2
Statement of facts.....	3
“Poppies” growing on appellant’s premises; kind not identified	3
Opium poppy seeds found in appellant’s house; pods in garage	5
No proof of fertility of seeds.....	7
The so-called “admissions”.....	8
Summary of the evidence	9
Argument	11
Introductory; appellant was presumed guilty.....	11
1. No proof that poppies growing were opium poppies..	11
2. (a) No proof that seeds found were capable of germination	12
2. (b) No proof of guilty intent	14
3. Appellant was deprived of fair trial by misconduct of United States attorney	15
4. Count three was barred by the statute of limitations	23
Instruction No. 14 in error.....	25

Table of Authorities Cited

Cases	Pages
Berger v. United States (1934) 295 U.S. 78, 55 S. Ct. 561, 87 L. Ed. 734.....	18, 20
Butler v. United States, 33 F. (2d) 382.....	25
Commonwealth v. Shoemaker, 240 Pa. 255, 87 A. 684, 38 Cyc. 1496	23
Lowdon v. United States (C.C.A. 5th) 149 F. 673.....	23
People v. Brophy (1954), 122 C.A. 2d 638, 265 P. 2d 593..	20
Stutz v. Bureau of Narcotics, etc. (D.C. N.D. Cal. N.D., 1944) 56 F. Supp. 810.....	15
Taliaferro v. United States (1931) (C.C.A. 9th) 47 F. (2d) 699.....	21, 22
United States v. Schneiderman (1952) 106 F. Supp. 892...	25
Viereck v. United States, 318 U.S. 236, 63 S. Ct. 561, 87 L. Ed. 734	20

Codes

18 United States Code Annotated:	
Section 3282, subdivision 10(b) (as amended September 1, 1954)	24
Section 3231	2
Section 3282	24
Section 3282 (as amended September 1, 1954).....	24
21 United States Code Annotated:	
Section 188-188n	1
Section 188a, subdivision (c)	12
Section 188b	11
Section 188f	13, 15
28 United States Code Annotated:	
Section 1291	2

No. 14,752

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AZ DIN,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S OPENING BRIEF.

**STATEMENT OF PLEADINGS AND FACTS DISCLOSING
BASIS UPON WHICH IT IS CONTENDED THAT DIS-
TRICT COURT HAD JURISDICTION AND THIS COURT
HAS JURISDICTION TO REVIEW JUDGMENT IN QUES-
TION.**

This is an appeal from a judgment against appellant in the United States District Court for the Northern District of California upon a verdict finding appellant guilty of violations of Title 21 USCA 188-188n (Relating to Production and Distribution of the Opium Poppy). (R. p. 5.) The charges are in one indictment containing three counts. (R. p. 3, 4.)

Count 1 charges that appellant without having first obtained a license, on June 3, 1954 wilfully, unlawfully and knowingly produced and attempted to produce the opium poppy. (R. p. 3.)

Count 2 charges that appellant, without a license, and on the same date wilfully, unlawfully and knowingly permitted the production of the opium poppy upon one certain place owned, occupied, used and controlled by him. (R. p. 4.)

Count 3 charges that appellant, without a license, heretofore prior to June 3, 1954 "at a time unknown" did wilfully, unlawfully and knowingly obtain opium seed for the purpose of opium poppy production. (R. p. 4.)

The verdict of the jury was guilty on all three counts. (R. p. 5.) Appellant was sentenced to imprisonment for three years on each count to run concurrently and to a fine on each count of \$500.00. (R. pp. 6, 7.)

The United States District Court had jurisdiction under 18 USCA Sec. 3231. This Court has jurisdiction under 28 USCA Sec. 1291.

Upon conclusion of the case of the prosecution appellant moved the Court for a judgment of acquittal and dismissal. (R. pp. 57-63.) The motion was denied. (R. p. 63.)

Thereafter on March 25, 1955, the appellant filed his notice of appeal (R. p. 7) and on May 21, 1955 filed his statement of points to be relied upon upon appeal (R. p. 105).

SPECIFICATION OF ERRORS.

Appellant makes the following specification of errors and states the following points upon which he intends to rely:

1. The motion for dismissal should have been granted as to the first and second counts because, there was no proof that the poppies found growing on appellant's property were opium poppies.

2. The motion for dismissal should have been granted as to the third count because:

(a) There was no proof that the seeds found in the possession of appellant were capable of germination and therefore capable of producing opium poppies.

(b) There was no proof that the appellant intended to use the seeds found for growing opium poppies.

3. Appellant was deprived of a fair trial by the misconduct of the United States attorney.

4. Count Three was barred by the Statute of Limitations. (18 USCA Sec. 3282.)

5. Instruction No. 14 charging the jury that proof that the offense was committed within five years of the filing of the charges was in error.

STATEMENT OF FACTS.

"Poppies" Growing on Appellant's Premises; Kind Not Identified.

On June 3, 1954 Joseph H. House, inspector for the State Narcotic Bureau, met Undersheriff Allen Leverett and Deputy Sheriff Clarence Crawford both of Colusa County at Arbuckle in that county (R. p. 36) and together the three went to the ranch of ap-

pellant situated approximately $3\frac{1}{2}$ miles south of Arbuckle (R. p. 12). What they saw when they went there was described by all three:

House testified:

“You come in on the south side of the house; there is a yard which is fenced and approximately the middle or near the east front of the yard there is a patch of approximately 150 poppy plants, approximately six feet tall. That was the first thing that was observed.

Q. And did you find any other poppy plants on the property?

A. Yes, there was one poppy plant to the west of the building, almost adjacent to the building, and three big poppy plants approximately east of the building.” (R. pp. 13, 14.)

Leverett testified:

“Q. What did you observe on this ranch?

A. Well, I observed some poppies growing south of the house when we first drove up in the yard and some poppies in bloom on the east side and west side of the house.

Q. And what did you do after you arrived?

A. I took some pictures of the poppies. . . . (The pictures were then identified and admitted in evidence as plaintiff’s exhibits 7, 8, 9, and 10.)” (R. pp. 31, 32.)

Crawford testified:

“Q. And what did you observe when you went around to this ranch, if anything?

.

A. Well, the first thing our attention was attracted to was some poppies growing in the yard around the house." (R. p. 36.)

There was no testimony in the record whatever as to what kind of poppies the witnesses saw growing at appellant's ranch.

(The fact that the government's agents consistently refrained from referring to the poppies growing at the ranch as opium poppies is significant in view of their particular care, elsewhere in their testimony to refer to the seeds which they found as *opium* poppy seeds.)

There was no effort made to qualify any of these men as experts able to distinguish a growing opium poppy plant from another variety or the poppy species.

There was no effort made to identify the poppies shown in the photographs (Plaintiff's exhibits 7, 8, 9, and 10) as being opium poppies either by witnesses competent to so distinguish them or otherwise.

For all that appears in this record these poppies may have been one of a thousand of innocuous types of poppies, including iceland poppies, metolius poppies, shirley poppies, or even California poppies.

Opium Poppy Seeds Found in Appellant's House; Pods in Garage.

From the yard the three government agents went into the house.

House testified:

"Q. And what did you find in the dwelling house?

A. I found numerous bottles and packages containing opium seeds.

Q. Mr. House, I show you a cardboard box, from which I have removed a burlap sack, and ask if you have seen the box and sack before?

A. Yes, I have seen the box. I wrote my initials and also the label on the outside, dated 6-4-53, name Az Din, City of West Arbuckle, violation, and the officers on the sack and the contents of the box and the date I gave it to the chemist.

Q. Do you know what is in the sack, the burlap sack?

A. Yes, there are 1301 opium poppy pods dried.

Q. *Where were these pods obtained, if you know?*

A. *They were obtained from the garage of Az Din.**

Q. And were they placed in this sack?

A. Yes, they were.

Q. Who placed them there?

A. Myself and undersheriff Leverett and deputy sheriff Crawford.

Q. What was done with the sack?

A. It was kept in my custody and taken to the State Narcotic Bureau, City of Sacramento, and turned over to chemist inspector Gilmore on 6-9-54." (R. pp. 14, 15.)

(The witness then was shown another sack containing bottles of seed which he identified as the seed found in the appellant's dwelling. The sack containing the pods taken from the garage were marked

*Emphasis ours throughout.

Plaintiff's Exhibit 1-A for identification and the bottles of seed were marked Exhibits 2, 3, 4, 5 and 6.) (R. pp. 15, 16, 17.)

Deputy Sheriff Clarence Crawford testified that he had seen the bottles containing the seed at appellant's residence. (R. pp. 38, 39.)

The poppy pods which had been found in appellant's garage (Pltf's Ex. 1-a) were later identified by Chemist Inspector Allen E. Gilmore, of the California Bureau of Narcotics Enforcement (R. p. 45) to be "from the plant commonly termed the opium poppy" (R. p. 49) and the jars of seed (Pltf's Ex. 2, 3, 4 and 5) were identified by seed analyst Letha Howard (R. p. 51) as opium poppy seed (R. p. 53) excepting that some of the seed was mustard seed (R. p. 56).

No Proof of Fertility of Seeds.

No test was made to determine whether or not the seed were fertile or sterile although this is a part of the work of the seed testing laboratory.

"A. Our work is testing seed. We haven't room enough to put them in the ground, so we test them in the laboratory for germination.

Q. Germination to see whether they would sprout and grow.

A. Yes.

Q. Did you do that with any of these seeds?

A. No.

Q. So you don't know of your own knowledge, whether these seeds are sterile, of your knowledge?

A. That wasn't the question. I identified them." (R. p. 57.)

As stated above there was no attempt made to identify the poppy plants *growing* at the ranch of the appellant as being opium poppy plants either by these witnesses or anyone else, either by reference to the photographs admitted in evidence or otherwise. Neither was any attempt made to connect up the poppy pods found in the garage with poppy plants found growing on appellant's premises.

Except for so-called "admissions" of appellant *the foregoing was the government's entire case.*

The So-called "Admissions".

Appellant Az Din is a foreigner whose ability to speak English is extremely limited.

Mr. House admitted:

"Q. You had never seen the defendant before?

A. No sir.

Q. Never talked to him before?

A. No, sir.

Q. Does he talk good English?

A. *Not very good, sir.*" (R. p. 25.)

After entering appellant's house during his absence and, so far as the record shows, apparently without a warrant, appellant was "brought back" to the premises by undersheriff Leverett (R. p. 17) and questioned by the three officers.

Asked about the unidentified flowers growing about the place he stated that he liked flowers. (R. p. 18.)

Asked about the opium poppy seeds he stated that he ground them up to make a tea which he drank. (R. p. 22.)

Asked about where he had obtained the seed he stated that he had obtained some of them at a drug store and that "some of the seeds he had obtained from other poppies." (R. p. 19.)

He stated that he knew it was against the law to grow the opium poppy. (R. p. 22.)

On cross-examination it was brought out:

"Q. Did you find any other seeds besides these at that place?

A. Yes, I did. . . .

Q. The other seeds were of an innoxious (innocuous?) type of seed and had no bearing upon this particular type of case, is that right?

A. That's right." (R. pp. 28, 29.)

This is substantially all of the evidence.

SUMMARY OF THE EVIDENCE.

Summarized the government's evidence exclusive of the so-called "confession" is:

1. That there was growing on the appellant's premises some poppies, kind or type never identified.

2. That in the garage on the appellant's place the government agents found some opium poppy pods.

3. That in the house the government agents found some opium poppy seeds in bottles, seeds not proven to be fertile but which if they were fertile could readily have been proven by the government to be such. Other bottles contained other seeds, some identified as mustard, some unidentified.

As stated above there was no attempt made to identify the poppy plants *growing* at the ranch of the appellant as being opium poppy plants either by these witnesses or anyone else, either by reference to the photographs admitted in evidence or otherwise. Neither was any attempt made to connect up the poppy pods found in the garage with poppy plants found growing on appellant's premises.

Except for so-called "admissions" of appellant *the foregoing was the government's entire case.*

The So-called "Admissions".

Appellant Az Din is a foreigner whose ability to speak English is extremely limited.

Mr. House admitted:

"Q. You had never seen the defendant before?

A. No sir.

Q. Never talked to him before?

A. No, sir.

Q. Does he talk good English?

A. *Not very good, sir.*" (R. p. 25.)

After entering appellant's house during his absence and, so far as the record shows, apparently without a warrant, appellant was "brought back" to the premises by undersheriff Leverett (R. p. 17) and questioned by the three officers.

Asked about the unidentified flowers growing about the place he stated that he liked flowers. (R. p. 18.)

Asked about the opium poppy seeds he stated that he ground them up to make a tea which he drank. (R. p. 22.)

Asked about where he had obtained the seed he stated that he had obtained some of them at a drug store and that "some of the seeds he had obtained from other poppies." (R. p. 19.)

He stated that he knew it was against the law to grow the opium poppy. (R. p. 22.)

On cross-examination it was brought out:

"Q. Did you find any other seeds besides these at that place?

A. Yes, I did. . . .

Q. The other seeds were of an innoxious (innocuous?) type of seed and had no bearing upon this particular type of case, is that right?

A. That's right." (R. pp. 28, 29.)

This is substantially all of the evidence.

SUMMARY OF THE EVIDENCE.

Summarized the government's evidence exclusive of the so-called "confession" is:

1. That there was growing on the appellant's premises some poppies, kind or type never identified.

2. That in the garage on the appellant's place the government agents found some opium poppy pods.

3. That in the house the government agents found some opium poppy seeds in bottles, seeds not proven to be fertile but which if they were fertile could readily have been proven by the government to be such. Other bottles contained other seeds, some identified as mustard, some unidentified.

Thus was the corpus delicti "established" to prove that on June 3, 1954 appellant was growing opium poppies!

Having thus established the corpus delicti, the government's case was then fortified by the appellant's "admissions" that:

4. He was growing the plants unidentified save that they were "poppies" because he liked flowers.

5. He had obtained part of the seeds found from a drug store and had raised part of them at some previous time—date and year undetermined.

6. That he used the seeds to make a tea which he drank to keep cool.

Upon this case the government predicated the charges: (1) That on June 3, 1954 appellant was wilfully, unlawfully and knowingly producing and attempting to produce the opium poppy;

(2) That within the period of limitations appellant was wilfully, unlawfully and knowingly obtaining opium poppy seed for the purpose of opium poppy production.

Appellant moved to dismiss and the motion was denied. Appellant put on no evidence.

The United States attorney then repeatedly argued: "Now this is a narcotics case" (R. pp. 82, 84), and notwithstanding the court's ruling that there was no evidence that the appellant was either a user of narcotics or intended to use the poppies for the ultimate production of narcotics (R. p. 90) he persisted in attempting to inflame the jury by repeated

references to his belief that the appellant was engaged in the narcotics trade (R. p. 98).

ARGUMENT.

INTRODUCTORY; APPELLANT WAS PRESUMED GUILTY.

As to each one of the counts the Court correctly instructed the jury that "the prosecution must prove to a moral certainty and beyond a reasonable doubt" all of the material elements of the crime charged. It charged that "the defendant is presumed to be innocent and that the presumption attends him to the end of the trial". (R. pp. 66, 69.) It charged that "the presumption of innocence . . . requires the Government to establish beyond a reasonable doubt every material fact averred in the indictment. (R. p. 69.)

But we respectfully submit that the solemn meaning of these fundamentally guaranteed rights and obligations on the government seems frequently to be dulled or lost in perfunctory repetition. Here the case never should have gone to the jury. The government made a case wholly founded upon a presumption of guilt.

1. NO PROOF THAT POPPIES GROWING WERE OPIUM POPPIES.

By 21 USCA Sec. 188b it is unlawful for any unlicensed person "to produce or attempt to produce the opium poppy, or to permit the production of the opium poppy in or upon a place owned . . . or controlled by him".

By subdivision (c) of Sec. 188a of that act, the term "opium poppy" is defined to be the plant "*Papaver somniferum*".

All that the government proved here was that they had found in the garage of appellant and had put into a burlap sack some pods of a plant which their chemist identified as pods from an opium poppy.

They also proved that there were some flowers growing on the property which the government agents described as "poppies" but which they carefully refrained from describing as "opium poppies".

Despite the requirement that the case be proved to a moral certainty there was no effort to connect the growing poppies with the pods found in the garage.

The jury was required to, and did, presume that the appellant was guilty of growing opium poppies because pods of the plant were found in the garage—a complete nonsequitur, and no effort whatever was made to question the appellant as to how the pods came to be there, or otherwise connect up their presence with the growing of the plant.

2. (a) NO PROOF THAT SEEDS FOUND WERE
CAPABLE OF GERMINATION.

Possession of opium poppy seed by an unlicensed person is not unlawful.

The law expressly provides that opium poppy seed may be sold to unlicensed persons to be used as a spice seed or for the making of oil *but this is not an exemp-*

tion to an otherwise prohibited possession because nowhere does the law make mere possession of the seed criminal or even illegal.

It is unlawful to obtain (and therefore possess) opium poppy seed only if so obtained “for the purpose of opium poppy production”.

21 USCA Sec. 188f.

Count 3 should have been dismissed because there was no proof whatever that the seeds in the appellant’s possession were obtained for the production of opium poppies *or that they were even capable of being so used.*

The total failure by the government in the presentation of this case to make any effort to prove that these seed—ANY of these seed—were capable of germination and therefore capable of producing opium poppies seems to us to demonstrate a cynical disregard for the rights of a defendant in a criminal case.

Appellant had stated to the agents that the seeds were acquired for the purpose of making a tea with cooling propensities. So used there is nothing sinister about opium poppy seed, which when crushed and brewed into a tea evidently have a spicy flavor, this to be deduced from the legally recognized potentiality of the use of the seed as a spice.

Without the slightest evidence negating this legitimate use of the seed the government agents—although their seed analyst freely admitted the facilities were available to her—failed to make the test. (R. p. 57.)

Why?

Was there a fear that the seeds would prove to be sterile and thus destroy even the flimsy case otherwise presented?

The seeds were not available to appellant to test. They were available to the prosecution and the means of making the test were readily at hand.

We submit that failure to prove that the seeds obtained were capable of producing opium poppies was failure to establish a necessary link in the proof required to establish the charge of the third count.

2. (b) NO PROOF OF GUILTY INTENT.

According to the government agents appellant had admitted that at some previous time (three, five, fifteen years before?) he had obtained some seed from plants which he had grown upon his premises and other seed from a drug store.

There was no evidence whatever that the seed which were found were intended to be used to grow other opium poppy plants (which was the necessary element to be proved if the charge of the third count was to be sustained).

On the contrary appellant, as shown above, had affirmed that the intent was to produce a tea—an innocent intent *which the law expressly allows*.

“ . . . seed obtained from opium poppies . . . may be sold or transferred by such producers to unlicensed persons . . . for ultimate consump-

tion as a spice seed or for the purpose of making of oil.”

21 USCA Sec. 188f.

“The Opium Poppy Control Act does not purport to regulate the production of an agricultural crop. The Act is directed to the growth of opium yielding poppy plants within the United States as the source, not of an edible food product, but rather of raw opium. Its effect upon the production of the poppy seed is incidental only to its operation on a plant which produces both narcotic drug and edible seed.”

Stutz v. Bureau of Narcotics, etc. (D.C. N.D. Cal. N.D.) (1944) 56 F. Supp. 810 at page 812.

It is true that the statement that the agents attribute to appellant that at some date in the past he had grown seed would have been an admission of an unlawful act committed in the past, but this did not involve any charge for which he was then being tried.

The only evidence of intent in this whole record was that the seed—whatever its source—was possessed for the lawful purpose of producing a spice tea.

3. APPELLANT WAS DEPRIVED OF FAIR TRIAL BY MISCONDUCT OF UNITED STATES ATTORNEY.

The question which any reasonable person would of necessity ask in the light of the foregoing review of the evidence is: How could the jury have returned a verdict of “Guilty” on such a flimsy case?

We submit they could not have done so except that appellant was tried, not upon the evidence, but upon the statements of the United States Attorney who argued NOT from the evidence produced at the trial but from his own imagination of what he suspected but couldn't prove but which he "testified" to in argument.

Repeatedly, the government agents sought to embellish their testimony with nonresponsive and clearly inadmissible conclusions. (e.g. see R. p. 19 where Inspector House seeks to testify: "indicating that he had grown poppies before".)

However reprehensible such conduct is on the part of trained government agents, it is scarcely to be noted in comparison with the conduct of the United States attorney in this case.

As demonstrated above there was not the slightest evidence that appellant was a user of narcotics, or that he had anything whatever to do with trafficking in narcotics. A native of Pakistan, his innocent addiction was shown to be a taste for the spicy tea, a use as lawful as the drinking of Lipton's product, made from opium poppy seed (and perhaps the other seed forms). To assume from the evidence in the record that he was identified in any way with the illicit narcotics trade and the spread of the narcotic habit was wholly unjustified; to seek to inflame the jury by so arguing was gross misconduct.

Yet here are the statements made by the United States Attorney:

“Now first of all it might be helpful for you to consider the fact that this is *a narcotics case*.” (R. p. 82.) “. . . Now this is *a narcotics case* and this statute was obviously passed by the Congress of the United States to prevent the spread of narcotics in this country.” (R. p. 84.) “. . . Now this is *a narcotics case* . . .” (R. p. 84.) “. . . Now we don’t know what he wanted all these seeds for. Was he getting ready to go into large scale production of these poppies?” (R. p. 87.) “. . . Furthermore, I do not believe that he just used the seeds to make the tea, either. Inasmuch as he was growing a narcotic plant, it would seem to me that he would make use of the narcotic in the plant rather than the seed.” (R. p. 90.)

Objection was made to such inflammatory and prejudicial statements and innuendoes and a motion for mistrial was made. The trial Court denied the motion and told the jury:

“The motion for a mistrial will be denied. Ladies and gentlemen of the jury, there is no evidence, as you know, to the effect that the defendant in this particular case was a user of narcotics, that he intended to use these poppies for the ultimate production of narcotics, and the evidence, so far as the Court recalls, is merely that he was producing the plant, as testified. You are instructed that in your deliberations and in arriving at your verdict, you should dismiss from your mind any comment made by counsel on this particular point. You may proceed, counsel.” (R. p. 90.)

If the Court's admonition was understood by the jury, it apparently was not understood (and certainly it was not heeded) by the prosecuting attorney who persisted in his endeavor to picture the defendant as a user and producer of narcotics by again stating to the jury:

"I don't believe it is necessary to mention to you again the field in which the use of narcotics has spread in our society and point out to you that the fact that opium poppies produce opium and that opium is used to make, among other things, heroin." (R. p. 98.)

These statements constituted misconduct on the part of the United States Attorney prejudicial to appellant and prevented him from having a fair trial.

In *Berger v. United States* (1934) 295 U.S. 78, 55 S. Ct. 561, 87 L. Ed. 734, a judgment of conviction of defendant having conspired with certain others knowingly to utter and pass counterfeit bank notes was reversed for prejudicial misconduct on the part of the prosecuting attorney. The Supreme Court stated at page 1320 of 79 L. ed.:

"The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features."

And on page 1321:

"The United States Attorney is the representative not of an ordinary party to a controversy,

but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

“It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. . . . Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, and persistent, with misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare *New York C. R. Co. v. Johnson*, 279 U.S. 310, 316-318, 73 L. ed. 706, 709, 710, 49 S. Ct. 300.

The views we have expressed find support in many decisions, among which the following are good examples: *People v. Malkin*, 250 N.Y. 185, 164 N.E. 900, *supra*; *People v. Esposito*, 224 N.Y.

370, 375-377, 121 N.E. 344; *Johnson v. United States* (C.C.A. 7th), 215 F. 679, *supra*; *Cook v. Com.*, 86 Ky. 663, 665-667; *Gale v. People*, 26 Mich. 157; *People v. Wells*, 100 Cal. 459, 34 P. 1078. The case last cited is especially apposite."

The rule, and language of the opinion, in the *Berger* case has found more recent reiteration in *Viereck v. United States*, 318 U.S. 236, 248 (63 S. Ct. 561, 87 L. ed. 734). Both of these cases were quoted from in the recent decision of the California District Court of Appeals in *People v. Brophy* (1954), 122 C.A. 2d 638, 265 P. 2d 593 where the prosecuting attorney in arguing a case involving an assault with a deadly weapon showed a bullet to the jury in his argument which had not been introduced in evidence.

The prosecuting attorney was also guilty of prejudicial misconduct in making statements to the jury regarding the personal knowledge of the prosecuting attorney of the issues. In his argument to the jury the prosecuting attorney testified as an unsworn witness:

"In the second place, you just can't buy poppy seeds in any drug store in this country I know of. seeds in any drug store in this country I know of." (R. p. 88.) "... I said I don't believe the defendant because he couldn't buy these seeds in any store I know of." (R. p. 89.)

Counsel for appellant objected to such prejudicial misconduct and the Court told the jury:

". . . There is no evidence, as evidence, presented before you that you can't buy poppy seed in a drug store. Counsel has said that he doesn't

know of any. I call your attention specifically to point that there is no proof or evidence on that point. Its materiality is something else. I think, counsel, that the comment concerning the inability to purchase these seeds should be stricken.”

But the United States attorney was not to be deterred from obtaining defendant’s conviction regardless of the method by which he would obtain it. Having been interrupted in his argument by the Court’s admonishment he resumed his argument and again told the jury:

“Let me say, if I may, ladies and gentlemen, that I do not believe the defendant when he said he got the seed from the drug store and the basis of my belief is from *my own experience*.” (R. p. 90.)

Again the United States attorney had ignored the standard of conduct required of him and pronounced by the United States Supreme Court in *Berger v. United States*, supra, that:

“He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

A conviction obtained by the use of such methods cannot stand.—*Taliaferro v. United States* (1931) (C.C.A. 9th) 47 F.(2d) 699.

In *Taliaferro v. United States* (1931) (C.C.A. 9th) 47 F. (2d) 699, defendant was found guilty by a jury of unlawful possession and transportation of intoxicating liquor. At the trial two prohibition agents testified defendant delivered a bottle of liquor to them but upon being arrested by them defendant grabbed the bottle and broke it in defendant's automobile. The two agents testified a small quantity of the liquor was recovered from the broken bottle and some of it was mopped up from the floor of the automobile. Testimony on behalf of defendant tended to show that the condition of the floor of the automobile was such that the liquor would have run through the cracks in the floor boards and immediately disappeared. On appeal defendant assigned as error the argument to the jury of the prosecuting attorney who stated during the course of his argument to the jury:

“As a matter of fact, while the prohibition department had it, we removed the floor-boards to take out the battery and the floor was in a different condition then than upon the night of the arrest. *I know that of my own knowledge.*”

The Ninth Circuit Court of Appeals held that such statement was prejudicial, and the failure of the Court on motion to instruct the jury to disregard it called for a reversal of the case.

The Court after setting forth the limits to which counsel may go in their argument stated at page 702:

“Cases are to be decided by juries upon the evidence, and when the evidence is offered by wit-

nesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not." (*Lowdon v. United States*, 149 F. 673, 676, (C.C.A. 5th.)

And the Court quotes from *Commonwealth v. Shoemaker*, 240 Pa. 255, 87 A. 684, 685, 38 Cyc. 1496:

"It is error for counsel * * * to state * * * his own knowledge of facts unless he has testified thereto as a witness, * * * or to insinuate that he has knowledge of facts which are calculated to prejudice the opposite party."

4. COUNT THREE WAS BARRED BY THE STATUTE OF LIMITATIONS.

Count 3 of the indictment charges:

"That the said defendant, . . . heretofore, prior to the 3rd day of June, 1954, at a time to the Grand Jurors unknown, near Arbuckle (etc.) . . . did wilfully, unlawfully and knowingly obtain poppy seed for the purpose of opium poppy production."

The indictment in this case was filed June 14, 1954. At that time Section 3282 of Title 18 of USCA provided as follows:

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted *within three years* next after such offense shall have been committed.”

Section 3282 of said title as amended on September 1, 1954, provides:

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted *within five years* next after such offense shall have been committed.”

Section 10(b) of act of September 1, 1954, provided:

“the amendment made (to this section) by subsection A (of such act) shall be effective with respect to offenses (1) committed on or after the date of an enactment of this act (September 1, 1954) or (2) committed prior to such date if on such date prosecution therefor is not barred by provisions of law in effect prior to such date.”

There was no evidence whatever in this case that the appellant had obtained the seed in question for growing opium poppies within three years of September 1, 1954, or within five years of June 3, 1954 for that matter, nor was there any evidence that the

appellant had obtained any seeds for any other purpose within said periods.

The burden was upon the prosecution to establish that the crime was committed within the period of the statute of limitations.

Butler v. U. S., 33 F. (2d) 382;

U. S. v. Schneiderman (1952) 106 F. Supp. 892.

Defense of the statute of limitations was raised in the motion for dismissal. (R. p. 62.)

The motion was denied.

The Court correctly instructed the jury that it was the burden of the government to prove that the alleged crime was committed within the period of limitations. (The Court incorrectly instructed as to what the period was.) However, since there was no proof from which the jury could find that the seeds had been obtained within three, five or fifty years the Court, and not the jury, should have determined the issue and the motion for judgment of dismissal should have been granted.

INSTRUCTION NO. 14 IN ERROR.

The Court instructed the jury (by Instruction No. 14):

“ . . . it being sufficient for the purposes of this case that it is shown that the offenses were committed within five years of the filing of the charges in this Court.”

Under the authorities above this instruction was clearly in error.

Dated, Sacramento, California,
October 14, 1955.

Respectfully submitted,
DUARD F. GEIS,
PIERCE & BROWN,
FRED PIERCE,
BENJAMIN H. BROWN,
Attorneys for Appellant.

No. 14,752

IN THE

United States Court of Appeals
For the Ninth Circuit

AZ DIN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LLOYD H. BURKE,

United States Attorney,

By JAMES S. EDDY,

Assistant United States Attorney,

404 Post Office Building,

Sacramento, California,

Attorneys for Appellee.

FILED

DEC 22 1955

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of facts.....	1
Questions on appeal.....	2
I. Error in instruction is waived unless objected to before the jury retires.....	3
Harmless error in instruction is not a ground for reversal	4
II. Mere irregularities and minor defects in an indictment must be raised by motion before trial or are deemed waived.....	5
III. It is not an element of any offense charged in 21 USCA 188-188n that any seeds therein described be capable of germination.....	6
IV. The record affords ample proof that opium poppies were growing on appellant's land.....	7
V. That there is no proof that appellant obtained seed for the purpose of opium poppy production.....	8
VI. That counsel for the plaintiff was guilty of prejudicial misconduct	8
In the absence of timely objection, misconduct of counsel is deemed to have been waived.....	8
Misconduct of counsel is cured by a corrective admonition to the jury or by a corrective instruction.....	9
No action of counsel was in fact misconduct or prejudicial	10

Table of Authorities Cited

Cases	Pages
Berg v. United States (9th CA), 176 F. 2d 122.....	4, 6
Burton v. United States, 202 U.S. 344.....	7
Carr v. Standard Oil Company, 181 F. 2d 15.....	10
Corley v. Cozart, 115 F. 2d 119.....	9
Hallinan v. United States (9th CA), 182 F. 2d 880.....	14
Kramer v. United States (9th CA), 166 F. 2d 515.....	7
Land v. United States, 177 F. 2d 346.....	5, 6
Langford v. United States (9th CA), 178 F. 2d 48.....	9
Ledbetter v. United States, 170 U.S. 606, 42 Law. Ed. 1162	4, 6
Miles v. United States, 103 U.S. 304.....	7
Morrisette v. United States, 187 F. 2d 427.....	4
Nemec v. United States (9th CA), 178 F. 2d 656.....	3, 9
Ochoa v. United States (9th CA), 167 F. 2d 341.....	9
O'Conner v. United States (9th CA), 175 F. 2d 477.....	4
Shockley v. United States, 166 F. 2d 704.....	4
United States v. Grayson, 166 F. 2d 863.....	5
United States v. Howard, 96 F. 2d 893.....	12
United States v. Socony-Vacuum Oil Co., 60 Supreme Court 811, 310 U.S. 150, 84 Law Ed. 129.....	9
Weeks v. Scharer, 129 F. 333.....	10
Witt v. United States (CA 9th), 196 F. 2d 285.....	6
Zeigler v. United States, 174 F. 2d 439.....	4

Rules

Federal Rules of Criminal Procedure:

Rule 7c	5
Rule 12b	6
Rule 52a	4

TABLE OF AUTHORITIES CITED

iii

Statutes

Pages

21	USCA 188-188n.....	6, 10
----	--------------------	-------

Texts

88	C.J.S. 355, Section 181b.....	12
88	C.J.S. 394, Section 200.....	10



No. 14,752

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AZ DIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

In answer to appellant's opening brief, appellee submits as follows:

STATEMENT OF FACTS.

1. On June 3, 1954, defendant owned and occupied a ranch at Box 55, Arbuckle, California. (RT 12.)

2. On said day, State Inspector House, Under-sheriff Leverett, and Deputy Sheriff Crawford drove onto said ranch and found growing thereon 154 poppy plants which were about six feet tall. (RT 12, 13, 24, and 25.) The plants were pulled up and yielded 132 mature pods. (RT 28, 38, and 43.)

3. The pods from the plant were removed to a chemical laboratory and identified as opium poppy pods. (RT 48 and 49.)

4. On said day the officers found five bottles containing seeds in defendant's house. (RT 22.) These seeds were identified as opium poppy seeds. (RT 52, 53 and 54.)

5. On said day the defendant orally admitted that he had grown the opium poppy plants from seed; that he had obtained part of the seed from a drug store and part from poppy plants which he had grown the previous year. (RT 40.) He said he knew it was illegal to grow opium poppies. (RT 18, 19, 21, 35, 39, and 40.)

6. The defendant herein was indicted on June 14, 1954, at Sacramento, California. He appeared and plead not guilty to all counts on July 1, 1954. On March 1-2, 1955, trial was had before a jury at Sacramento, California, the Honorable John R. Ross presiding. A verdict of guilty on all counts was returned on March 2, 1955. On March 22, 1955, judgment was pronounced as three years' imprisonment and \$500 fine on each count. The term of imprisonment on each count was made to run concurrently with the term of imprisonment on every other count. Appeal was timely made to this Court.

QUESTIONS ON APPEAL.

Appellant has urged six points upon this appeal as follows:

I.

That instruction number 14 (RT 68) is in error.

II.

That Count 3 of the Indictment herein (RT 4) does not charge a criminal offense.

III.

That there is no proof that the seeds in evidence were capable of germination.

IV.

That there is no proof that opium poppies were growing on appellant's land.

V.

That there is no proof that appellant obtained seed for the purpose of opium poppy production.

VI.

That counsel for the plaintiff was guilty of prejudicial misconduct.

I.

**ERROR IN INSTRUCTION IS WAIVED UNLESS OBJECTED
TO BEFORE THE JURY RETIRES.**

As to Point I, it is to be noted that the defendant did not object to said instruction. Rule 30 of the Federal Rules of Criminal Procedure requires that a party objecting to an instruction declare his objection before the jury retires to consider its verdict. This, the defendant did not do. (RT 102.) See also *Nemec*

v. United States (9th CA), 178 F. 2d 656; *O'Conner v. United States* (9th CA), 175 F. 2d 477; *Zeigler v. United States*, 174 F. 2d 439; *Shockley v. United States*, 166 F. 2d 704.

**HARMLESS ERROR IN INSTRUCTION IS NOT A
GROUND FOR REVERSAL.**

If instruction number 14 is in error, the error is harmless. (Rule 52, Federal Rules of Criminal Procedure.) Effective September 1, 1954, the statute of limitations on general crimes committed against the United States was amended and increased from three years to five years. This was not intended to, and did not, revive crimes which said statute had banned prior to September 1, 1955. On June 14, 1954, the indictment herein was filed. Said filing stopped the running of the statute as to all crimes therein charged, including Count 3. On said date, the charge embraced only crimes committed after June 14, 1951.

The Government concedes that instruction number 14, while correct as far as it goes, would have been more complete if it had included a proviso excepting the period June 14, 1949, to June 14, 1951. However, none of the evidence in this case concerns the excepted period and for that reason the error, if any, is harmless and should be disregarded. (Rule 52a, Federal Rules of Criminal Procedure.) *Ledbetter v. United States*, 170 U.S. 606, 42 Law. Ed. 1162; *Berg v. United States* (9th CA), 176 F. 2d 122; *Morrisette v. United*

States, 187 F. 2d 427; *United States v. Grayson*, 166 F. 2d 863; *Land v. United States*, 177 F. 2d 346.

All of the evidence in this case concerns evidence occurring in 1954, except the testimony concerning the prior growing of opium poppies and it concerns 1953:

“Q. Did the defendant say anything about where he might have obtained the seeds which you have seen?

A. He mentioned buying them in a drug store. That was the first and I believe he also stated that he had used some of the seeds later that year from plants he had the previous year.” (RT 40.)

The plaintiff submits that if instruction number 14 is in error, the error was harmless and also that the error, if any, has been waived by the defendant's failure to object to it.

II.

MERE IRREGULARITIES AND MINOR DEFECTS IN AN INDICTMENT MUST BE RAISED BY MOTION BEFORE TRIAL OR ARE DEEMED WAIVED.

The defendant urges that Count 3 of the Indictment does not charge a criminal offense because the exact time of the offense is not set forth. It is not essential that the exact time of the offense be set forth in the Indictment. It is sufficient if the allegations are sufficiently definite to inform the accused of the charge that he must meet. (Rule 7c of the Federal Rules of Criminal Procedure.) Furthermore, as the

defendant did not question the sufficiency of the Indictment by motion in the trial Court, he has waived any irregularities other than jurisdiction or that the Indictment fails to charge an offense. (Rule 12b, Federal Rules of Criminal Procedure.) *Witt v. United States* (CA 9th), 196 F. 2d 285. The date of the offense is not a material allegation. *Ledbetter v. United States*, *Berg v. United States*, *Land v. United States*, *supra*.

III.

IT IS NOT AN ELEMENT OF ANY OFFENSE CHARGED IN 21 USCA 188-188n THAT ANY SEEDS THEREIN DESCRIBED BE CAPABLE OF GERMINATION.

The defendant concedes that there is no evidence that the seeds introduced in evidence (Plaintiff's Exhibits 2, 3, 4, 5, and 6) were capable of germination; however, the statute does not specify that the seeds must be so. (21 USCA 188-188n.) The evidence does reveal that the defendant obtained seeds and sowed the crop which was standing on his land. He obtained these seeds partly from a third person and partly from opium plants which he had grown in 1953. (RT 19, 35, and 40.) It is obvious that the seeds that he obtained were capable of germination, because they grew. Inasmuch as he, in fact, obtained them and in fact produced opium poppies from them knowing what they were, the jury was entitled to draw the inference that he had obtained them for the purpose of opium poppy production.

IV.

THE RECORD AFFORDS AMPLE PROOF THAT OPIUM POPPIES
WERE GROWING ON APPELLANT'S LAND.

The Court's attention is directed to the record, as follows:

1. State Narcotic Inspector House was qualified to recognize opium poppies and he saw them on defendant's land. (RT 13, 14, and 25.)

2. The plants were pulled up and the pods therefrom taken to a chemist who was qualified to and did identify them as opium poppy pods. (RT 28, 38, 43, and 49.)

As the defendant suggests, it may be that from the direct examination of the witness House, standing alone, there is no connection shown between the plants seen growing in the yard and the pods analyzed by the chemist. However, the defendant overlooks the testimony of the witness Crawford and the cross-examination of Inspector House. (RT 28, 38, and 43.) If there is sufficient evidence to go to the jury in a criminal case, the Appeal Court will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of the evidence, but will limit its decisions to questions of law. *Burton v. United States*, 202 U.S. 344; *Miles v. United States*, 103 U.S. 304; *Kramer v. United States* (9th CA), 166 F. 2d 515.

defendant did not question the sufficiency of the Indictment by motion in the trial Court, he has waived any irregularities other than jurisdiction or that the Indictment fails to charge an offense. (Rule 12b, Federal Rules of Criminal Procedure.) *Witt v. United States* (CA 9th), 196 F. 2d 285. The date of the offense is not a material allegation. *Ledbetter v. United States*, *Berg v. United States*, *Land v. United States*, *supra*.

III.

IT IS NOT AN ELEMENT OF ANY OFFENSE CHARGED IN 21 USCA 188-188n THAT ANY SEEDS THEREIN DESCRIBED BE CAPABLE OF GERMINATION.

The defendant concedes that there is no evidence that the seeds introduced in evidence (Plaintiff's Exhibits 2, 3, 4, 5, and 6) were capable of germination; however, the statute does not specify that the seeds must be so. (21 USCA 188-188n.) The evidence does reveal that the defendant obtained seeds and sowed the crop which was standing on his land. He obtained these seeds partly from a third person and partly from opium plants which he had grown in 1953. (R/T 19, 35, and 40.) It is obvious that the seeds that he obtained were capable of germination, because they grew. Inasmuch as he, in fact, obtained them and in fact produced opium poppies from them knowing what they were, the jury was entitled to draw the inference that he had obtained them for the purpose of opium poppy production.

IV.

**THE RECORD AFFORDS AMPLE PROOF THAT OPIUM POPPIES
WERE GROWING ON APPELLANT'S LAND.**

The Court's attention is directed to the record, as follows:

1. State Narcotic Inspector House was qualified to recognize opium poppies and he saw them on defendant's land. (RT 13, 14, and 25.)

2. The plants were pulled up and the pods therefrom taken to a chemist who was qualified to and did identify them as opium poppy pods. (RT 28, 38, 43, and 49.)

As the defendant suggests, it may be that from the direct examination of the witness House, standing alone, there is no connection shown between the plants seen growing in the yard and the pods analyzed by the chemist. However, the defendant overlooks the testimony of the witness Crawford and the cross-examination of Inspector House. (RT 28, 38, and 43.) If there is sufficient evidence to go to the jury in a criminal case, the Appeal Court will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of the evidence, but will limit its decisions to questions of law. *Burton v. United States*, 202 U.S. 344; *Miles v. United States*, 103 U.S. 304; *Kramer v. United States* (9th CA), 166 F. 2d 515.

V.

**THAT THERE IS NO PROOF THAT APPELLANT OBTAINED SEED
FOR THE PURPOSE OF OPIUM POPPY PRODUCTION.**

The defendant admits that he obtained seed and planted it knowing what it was and grew opium poppies. (RT 18, 21, 35, 39 and 40.) Inasmuch as the common purpose of any seed is to grow the plant of which it is the potential and as he, in fact, produced opium poppies with the seed which he obtained, a justifiable inference may certainly be drawn and was drawn by the jury that he had such an intent at the time he obtained the seed.

VI.

**THAT COUNSEL FOR THE PLAINTIFF WAS GUILTY OF
PREJUDICIAL MISCONDUCT.**

The defendant alleges that he was deprived of a fair trial by misconduct of the United States Attorney and quotes from the transcript herein in nine places. To read the transcript in its entirety is all that is necessary to see the falsity of his allegation. The remarks of counsel were neither inflammatory nor prejudicial, nor did he testify. Nor did he imply that the defendant was a narcotic addict.

**IN THE ABSENCE OF TIMELY OBJECTION, MISCONDUCT OF
COUNSEL IS DEEMED TO HAVE BEEN WAIVED.**

It may first be noticed that the defendant did not object to counsel's comments, except at two points

and in regard to two remarks. (RT 88 and 90.) Unless he has objected and requested an admonition, the defendant cannot complain of remarks of counsel. *United States v. Socony-Vacuum Oil Co.*, 60 Supreme Court 811, 310 U.S. 150, 84 Law Ed. 129; *Ochoa v. United States* (9th CA), 167 F. 2d 341; *Langford v. United States* (9th CA), 178 F. 2d 48; *Nemic v. United States*, *supra*; *Corley v. Cozart*, 115 F. 2d 119, wherein at page 119, the Court says as follows:

“Assignment 21 is that the court erred in permitting the case to go to the jury after government counsel had made a closing argument portions of which the assignment characterizes as ‘prejudicial misconduct.’ There was, at the time of the argument, no objection thereto except a statement by appellant’s counsel that he was going to assign as misconduct and as being improper ‘the allusion to (appellant) as a narcotic peddler.’ There was, in fact, no such allusion, nor did appellant at any time object to the submission of the case to the jury. There is, therefore, no basis for this assignment.”

**MISCONDUCT OF COUNSEL IS CURED BY A CORRECTIVE AD-
MONITION TO THE JURY OR BY A CORRECTIVE INSTRU-
CTION.**

In the two places where the defendant did object, the Court admonished the jury on the point in question. Furthermore, in his instructions, the Court instructed the jury to disregard the remarks of counsel in weighing the evidence. (RT 76, 77, 88, and 90.) Said admonition and instruction had the effect of

curing any possible prejudice. 88 C.J.S. 394, Section 200; *Carr v. Standard Oil Company*, 181 F. 2d 15; *Weeks v. Scharer*, 129 F. 333.

**NO ACTION OF COUNSEL WAS IN FACT
MISCONDUCT OR PREJUDICIAL.**

Nor were any of these remarks inflammatory or prejudicial. In the order mentioned in the defendant's brief, they were as follows:

On page 17 of his brief the defendant quotes from reporter's transcript, pages 82 and 84, three instances wherein the United States Attorney characterizes this case as a narcotic case. This Indictment was brought under 21 USCA 188-188n, entitled "DOMESTIC CONTROL OF PRODUCTION AND DISTRIBUTION OF THE OPIUM POPPY", and under policy described in 21 USCA 188, as follows:

"It is the purpose of sections 188-188n of this title (1) to discharge more effectively the obligations of the United States under the International Opium Convention of 1912, and the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 1931."

It is obviously a narcotic case and it was not improper so to characterize it; nor was objection made to this characterization at the time it was made during trial.

Also, on page 17 of his brief, the defendant proclaims that counsel commented upon the large number

of opium poppy seeds possessed by him and the use to which they might be put. This was surely fair comment on the evidence in the light of the underlying purpose of the statute, nor was objection made to this at the time of trial. Also, on page 17 of his brief, the defendant complains of the following language of the United States Attorney from page 90 of the reporter's transcript:

“Furthermore, I do not believe that he just used the seeds to make the tea, either. Inasmuch as he was growing a narcotic plant, it would seem to me that he would make use of the narcotic in the plant rather than the seed. But as I mentioned before * * *”

It is quite apparent from the record that counsel was drawing the inference that where common experience shows a strong probability that a certain thing will be used in a certain way (seeds will be planted and the common fruits therefrom collected and used), it probably has been so used in the instant case, rather than used in some rare or unusual way (seeds ground up to make tea). The record reveals that this comment was so intended and appellee believes that the jury so understood it. The word “use” was obviously intended in its general sense. Counsel did not there characterize the defendant as a “user”, nor did he at any time refer to the defendant as a narcotic addict or “user”. However, to this remark the defendant objected and if there were any prejudice it was cured by the admonition which followed:

“The Court. The motion for a mistrial will be denied. Ladies and gentlemen of the jury, there

is no evidence, as you know, to the effect that the defendant in this particular case was a user of narcotics, that he intended to use these poppies for the ultimate production of narcotics, and the evidence, so far as the Court recalls, is merely that he was producing the plant, as testified. You are instructed that in your deliberations and in arriving at your verdict, you should dismiss from your mind any comment made by counsel on this particular point.” (RT 90-91.)

On page 18 of his brief, the defendant complains that counsel commented upon the social dangers attending the production and use of narcotics. It is surely proper to comment upon the purpose of a statute and upon the evil which it seeks to correct; nor did the defendant object to this at the time of trial.

On pages 20 and 21 of his brief, the defendant alleges that he was denied a fair trial because counsel “testified” as a matter of his “personal knowledge.” The record reveals that this is palpably untrue.

It is quite necessary and proper for counsel to rely on his own experience on expounding his ideas. 88 C.J.S. 355, Section 181b: “Counsel may properly argue and comment on self-evident facts and matters of common knowledge outside the record.” *United States v. Howard*, 96 F. 2d 893. Indeed, every man must do so, for he has nothing else upon which to rely. Every man must assume that in common every day matters his experience is similar to that of another. If he did not do so, he could not communicate with others on any subject. In the instant case, when

counsel argued: "In the second place, you just can't buy poppy seeds in any drug store in this country I know of." (RT 88), he meant no more than that common experience shows that *opium* poppy seeds cannot be purchased in a drug store in this country. Albeit his choice of language was inelegant, he would have put his meaning more clearly if he had used "common experience reveals" in place of "I know of", or, perhaps had rhetorically declared, "Do you know of any drug store in this country where opium poppy seeds can be bought?" But despite his choice of language, the record reveals that he was not testifying to facts within his own personal knowledge.

On page 89 of the record, counsel repeats the declaration made on page 88. This is not, and could not, be in the record, but the repetition was made because the last four words of the first declaration, "that I know of," were made inaudible by the first four words uttered by defendant's counsel, "I object to that." and counsel thought that these words were unheard by the Court. Other than this, the repetition has no bearing upon the claim of prejudice now made. The defendant objected to these remarks and if there were any prejudice, it was cured by the admonition which followed:

"The Court. Ladies and gentlemen, this comes under what I told you in the beginning. We occasionally run into statements by counsel, in the course of arguments, and they are objected to. There is no evidence, as evidence, presented before you that you can't buy poppy seed in a drug

store. Counsel has said that he doesn't know of any. I call your attention specifically to point that there is no proof or evidence on that point. Its materiality is something else. I think, counsel, that the comment concerning the inability to purchase these seeds should be stricken." (RT 89.)

On page 90 of the transcript, counsel is apparently of the opinion that it is within the fair boundaries of argument to tell the jury that he does not believe a self-serving portion of the defendant's statement in evidence. He is right. This is within the boundaries of fair comment. *Hallinan v. United States* (9th CA), 182 F. 2d 880, where at page 885 the Court declares as follows:

"Of course, counsel may, and often does, in argument to the jury, after the evidence has been presented, give the jury the benefit of his opinion of the veracity of the witnesses and the character and weight of testimony presented. That is the orderly manner and proper time to do so and the full duty which a lawyer owes to his client in this respect may then be fully discharged."

That he added that the basis for his belief was based on his experience (meaning common experience), added nothing to the declaration. What else could he have based it on? At all events, he was not testifying. This is as though he had said, "I did not believe the defendant when he testified that he went swimming and did not get wet, and the basis for my belief is my own experience."

For the foregoing reasons the appellee respectfully submits that the judgment herein should be affirmed.

Dated, Sacramento, California,
December 16, 1955.

LLOYD H. BURKE,

United States Attorney,

By JAMES S. EDDY,

Assistant United States Attorney,

Attorneys for Appellee.



No. 14,752

IN THE
United States Court of Appeals
For the Ninth Circuit

AZ DIN,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

DUARD F. GEIS,

Willows, California,

PIERCE & BROWN,

FRED PIERCE,

BENJAMIN H. BROWN,

1023 H Street, Sacramento, California,

*Attorneys for Appellant
and Petitioner.*

FILED

MAR 29 1956

PAUL P. O'BRIEN, CLERK



Table of Authorities Cited

Cases	Pages
Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726.....	3
Gambino v. United States, 274 U.S. 310, 48 S.Ct. 137, 72 L. Ed. 293	3
Gros v. United States, 136 F.2d 878.....	2
Hammond v. Farina Bus Line & Transp. Co., 275 U.S. 173, 72 L.Ed. 222, 48 S.Ct. 70.....	7
Lustig v. United States, 338 U.S. 74, 93 L.Ed. 1819.....	3
People v. Cahan (April 1955), 44 C.2d 434, 282 P.2d 905..	4, 5
People v. Kitchens (Feb. 1956), 46 A.C. 257, P.2d	2, 6
Rea v. United States (January 1956), 100 L.Ed. 213.....	4, 5
Runnels v. United States, 138 F.2d 346.....	2
United States v. Haupt, 136 F.2d 661.....	3
United States v. Rio Grande Dam & Irrig. Co., 184 U.S. 416, 46 L.Ed. 619, 22 S.Ct. 428.....	7
Wolf v. Colorado, 338 U.S. 25, 93 L.Ed. 1792, 69 S.Ct. 1359	4
Wyberg v. United States, 163 U.S. 632, 16 S.Ct. 1127, 41 L.Ed. 289	3

Constitutions

United States Constitution:	
Fourth Amendment	5
Fourteenth Amendment	5

Rules

Federal Rules of Criminal Procedure, Rule 33.....	7
---	---

Statutes

U.S.C.A. Title 18, Rule 33, note 38.....	7
--	---

Texts

3 Am. Jur. Section 1211, page 713.....	7
--	---

George A. D. Jones, 1873

Am. J. 1873

No. 14,752

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AZ DIN,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Walter L. Pope,
and Dal M. Lemmon, Circuit Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Az Din, the defendant-appellant above named presents this, his petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

That the grounds of said petition are as follows:

I. If the rule respecting the inadmissibility in Federal Courts by evidence procured by state agents illegally has been changed, failure to move in the trial Court to suppress the evidence or to object to its

introduction does not preclude appellant from relief on appeal.

(a) The point that the conviction was obtained by evidence procured by a state narcotic agent and two deputy sheriffs by an illegal search and seizure was made by appellant in his reply brief p. 13 et seq.

(b) In its opinion the Court has stated that the point cannot be maintained because:

1. "No motion was made to suppress this evidence . . ." (p. 2.)

(c) In answer to this we respectfully contend that the rule is that if at the time the illegally obtained evidence is admitted no objection or motion to suppress is made, the evidence being admissible as the law stood at the time of the trial, the appellant is not precluded from raising the objection on appeal if the rule relating to the admissibility of the evidence is changed after the trial.

The reasoning: A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendant might hope that an established rule of evidence would be changed on appeal. Moreover, an objection being futile "the law neither does nor requires idle acts."

People v. Kitchens (Feb. 1956), 46 A.C. 257,
..... P. 2d (citing the following Federal cases:

Gros v. United States, 136 F. 2d 878;

Runnels v. United States, 138 F. 2d 346;

United States v. Haupt, 136 F. 2d 661;
Gambino v. United States, 274 U.S. 310, 48 S.
 Ct. 137, 72 L.Ed. 293;
Clyatt v. United States, 197 U.S. 207, 221-222,
 25 S.Ct. 429, 49 L.Ed. 726;
Wyberg v. United States, 163 U.S. 632, 658, 16
 S.Ct. 1127, 41 L.Ed. 289.)

II. The opinion in the instant case further answers the "illegal search and seizure argument" by stating "The search and seizure was by state officers." (p. 2.) Although the United States has not yet categorically adopted the rule that evidence illegally seized by state officers cannot be used in Federal cases, the question:

(a) was left open by the majority opinion of Mr. Justice Frankfurter in *Lustig v. United States*, 338 U.S. 74, 93 L.Ed. 1819, saying (on p. 1833 of L.Ed.) "*it is not necessary to consider what would be the result if the search had been conducted entirely by State officers*".* The following language from the majority opinion is also to be noted:

"It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with a view to its use in a federal prosecution or the federal agent himself takes the articles out of a bag."

(b) The concurring opinion in the *Lustig* case of Mr. Justice Murphy with whom Mr. Justice Douglas

*Emphasis ours throughout.

and Mr. Justice Rutledge joined are further indicative of the establishment of a new rule (on p. 1824 of L.Ed.):

“In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us.”

Mr. Justice Black also concurring with the majority opinion, indicated that his views are the same.

(c) The trend of judicial thinking in the United States Supreme Court is also indicated by:

(c-1) *Wolf v. Colorado*, 338 U.S. 25, 93 L.Ed. 1792, 69 S.Ct. 1359 (both the concurring and the dissenting opinion of Mr. Justice Murphy) and

(c-2) the majority opinion of Mr. Justice Douglas, concurred in by Chief Justice Warren, and Associate Justices Black, Frankfurter and Clark in *Rea v. United States* (January 1956), 100 L.Ed. 213, holding that the policy of Federal Rules of Criminal Procedure governing searches and seizures would be defeated if a federal officer could use the fruits of an unlawful search either in federal or state proceedings.

(d) There is persuasive reasoning in the holding of the Supreme Court of California (per Justice Traynor) in *People v. Cahan* (April 1955), 44 C. 2d 434, 282 P. 2d 905. Since this case if the United States Supreme Court would hold contrary to the rule here contended for it would result in the following anomaly:

(d-1) That evidence illegally obtained by a federal agent and sought to be used in a Federal Court would violate the Fourth Amendment;

(d-2) That evidence illegally obtained by a state or federal agent and sought to be used in the State Court (of California) would violate the Fourteenth Amendment;

(d-3) That the United States District Court would enjoin the attempted use by a federal agent in a State Court of evidence illegally obtained by the federal agent as a violation of the Federal Rules of Criminal Procedure (the *Rea* case); but

(d-4) that evidence illegally obtained by a state agent could be used in a Federal Court.

It is submitted that whenever a state has decreed that use of evidence illegally seized by a state officer is inadmissible in the Courts of that state as violating the Fourteenth Amendment (as has been decreed in *People v. Cahan*, supra) the same rule should be applied in the United States Courts with reference to the same evidence, under the Fourth Amendment.

III. The opinion states: "It is not shown that they (i.e. the state officers) did not have a search warrant. We respectfully submit that it sufficiently appears that the evidence here was illegally obtained as the result of an illegal search.

(a) The record in this case does not expressly show that the state and county agents who searched the appellant's house had a search warrant but from the fact that none of the agents who purported to

describe all of the events preceding the search mentioned such a warrant (deputy sheriff Crawford's testimony was particularly complete in this regard Tr. p. 37) the reasonable inference is that no search warrant was obtained.

(b) The witness Crawford stated that Inspector House "asked permissioin to come into the house" thus also inferring that there was no search warrant—had there been one no permission would have been sought. (Tr. p. 37.)

(b-1) However, there is no evidence that permission was obtained. The person of whom permission was sought was never connected in any way with the appellant who was not present.

(c) Similar evidence, or lack of it, was held "to support the conclusion that the search and seizure at the time of the defendant's arrest was unlawful."

People v. Kitchen, 46 A.C. 257 at p. 260.

IV. In the interests of justice, if the Court holds that the record of an illegal search is not sufficiently clear to justify a reversal, the case should be remanded to take evidence.

(a) If the rule of the California Supreme Court in *People v. Kitchen*, supra and the federal cases there cited is sound then the appellant should not be penalized on appeal from raising the question of the illegal search and seizure.

(b) Appellant contends that the decisions reviewed under "II" above indicate that the views of the Supreme Court on the question involved have changed

to such an extent that the former federal rule can no longer be said to be settled.

(c) If this Court however deems that it *is* bound by the earlier holdings of the United States Supreme Court then application for a writ of certiorari should be made so that the Supreme Court can rule on the question.

(d) To facilitate this, if there is any question about the factual situation, the case should be remanded so that evidence can be taken and the proof established that:

(d-1) There was no search warrant;

(d-2) The search and seizure was without permission.

(e) This Court has power to remand. The power is inherent and is also referable to Rule 33, Federal Rules of Criminal Procedure.

“A case will be remanded for further evidence, or for further proofs, where the interests of justice appear to require it.” 3 Am. Jur. §1211, page 713; *Hammond v. Farina Bus Line & Transp. Co.*, 275 U.S. 173, 72 L.Ed. 222, 48 S.Ct. 70; *United States v. Rio Grande Dam & Irrig. Co.*, 184 U.S. 416, 46 L.Ed. 619, 22 S.Ct. 428.

For cases collected under said Rule 33 see U.S.C.A. Title 18, Rule 33, note 38.

V. Without having further argument to make, or authorities to add, to the previous briefs, appellant asks as a further ground of reversal and rehearing that this Court reconsider its holding that the state-

ment of the United States attorney: "it would seem to me that he would make use of the narcotic in the plant rather than the seed" was cured by the Court's instruction.

(a) It is submitted that no instruction could have cured the impression put into the jury's mind by this statement;

(b) that it was aggravated by repetition of the United States attorney on page 98 inferring that the purposes for which these poppies were being grown was the production of opium and the illicit encouragement of the use of heroin. (See Appellant's Opening Brief, p. 18.)

(c) that both the jury and the trial Court must have so considered this case seems evident from the fact that the verdict was returned on all counts, and the sentence imposed upon appellant.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

Dated, Sacramento, California,

March 28, 1956.

DUARD F. GEIS,

PIERCE & BROWN,

FRED PIERCE,

BENJAMIN H. BROWN,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Sacramento, California,
March 28, 1956.

FRED PIERCE,
*Of Counsel for Appellant
and Petitioner.*

No. 14755

United States
Court of Appeals
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation, Appellant,

vs.

SULLIVAN MINING COMPANY, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the District
of Idaho, Northern Division

FILED

JUL 20 1955

PAUL P. O'BRIEN, CLERK



No. 14755

United States
Court of Appeals
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation, Appellant,

vs.

SULLIVAN MINING COMPANY, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the District
of Idaho, Northern Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer and Affirmative Defense	8
Appeal:	
Certificate of Clerk to Transcript of Record	
on	37
Designation of Record on (DC)	33
Motion to Withdraw Exhibits on	34
Notice of	32
Order Extending Time to Docket	37
Order to Withdraw Exhibits on	36
Request for Printing of Record and State-	
ment of Points on (USCA)	196
Stipulation re Copies of Documents Offered	
in Evidence on	14
Stipulation that Exhibits May Be Considered	
in Original Form on (USCA)	202
Certificate of Clerk to Transcript of Record..	37
Complaint	3
Designation of Contents of Record (DC)	33
Findings of Fact and Conclusions of Law....	19

ii.

Judgment	29
Memorandum Opinion	16
Minutes of the Court:	
Nov. 5, 1952—Hearing on Motion to Dismiss —Ordered Stricken	8
Nov. 2-3-4, 1953—Trial	15-16
May 19, 1954—Order Plaintiff have 20 additional days within which to File Reply Brief	16
Oct. 11, 1954—Hearing on Motion for New Trial	31
Motion for New Trial:	
Filed Aug. 18, 1954	18
Filed Sept. 3, 1954	30
Motion to Dismiss	7
Motion to Withdraw Exhibits.....	34
Affidavit of L. Vincent Donahue.....	35
Names and Addresses of Attorneys.....	1
Notice of Appeal	32
Opinion, Memorandum	16
Order Denying Motion for New Trial.....	31
Order Extending Time to Docket Appeal.....	37
Order to Withdraw Exhibits	36
Request for Printing of Record and Statement of Points (USCA)	196
Stipulation re Copies of Documents Offered in Evidence	14

Stipulation that Exhibits May Be Considered in Original Form	202
Summons	6
Transcript of Proceedings and Testimony....	39
Witnesses:	
Roehl, Vernon	
—direct	188
—cross	191
Wolf, Wallace G.	
—direct	40
—cross	126
—redirect	173
—recross	180



NAMES AND ADDRESSES OF ATTORNEYS

L. VINCENT DONAHUE,
STIMSON & DONAHUE,
421 Symons Building,
Spokane, Washington,

TOM B. PAINE,
Wallace, Idaho,
Attorneys for Appellant.

CHAS. E. HORNING,
Wallace, Idaho,

ROBERT E. BROWN,
Kellogg, Idaho,
Attorneys for Appellee.



In the District Court of the United States for the
District of Idaho, Northern Division

No. 1868

SULLIVAN MINING COMPANY, a Corporation,
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a Corporation, Defendant.

COMPLAINT

Plaintiff for cause of action alleges:

I.

That at all of the times hereinafter mentioned the plaintiff has been and is now a corporation organized and existing under the laws of the State of Idaho, and engaged in the business, among other things, of purchasing, and processing at its smelter at Silver King, Shoshone County, Idaho, zinc concentrates produced from ores mined in said Shoshone County and elsewhere.

II.

That at all of the times hereinafter mentioned the defendant has been and is now a corporation created by an Act of the Congress of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government.

III.

The jurisdiction of this Court is based upon the provisions of 15 U.S.C.A., Section 603 (a).

IV.

Metals Reserve Company was created by an Act of Congress on or about June 28, 1940, and thereafter continued to exist as an agency of the United States Government until it was duly and regularly dissolved on or about June 30, 1945, as hereinafter set out.

V.

On or about June 18, 1942, plaintiff entered into a contract in writing with said Metals Reserve Company in and by which it was provided and agreed, among other things, that plaintiff, as agent for said Metals Reserve Company, should purchase for the account of said Metals Reserve Company zinc concentrates in specified monthly quantities, the purchase price of said concentrates to be paid by Metals Reserve Company; that said concentrates so purchased should be stockpiled by the plaintiff at its expense and should thereafter be sold by said Metals Reserve Company to the plaintiff from time to time as the plaintiff should be able to process the same at its said smelter.

VI.

That a modification of said contract was thereafter, to-wit, on August 9, 1944, approved in writing by plaintiff and said Metals Reserve Company providing that said Metals Reserve Company should

have the right at its sole option to remove all or any part of the zinc concentrates purchased and stockpiled by the plaintiff for the account of Metals Reserve Company, the plaintiff, however, to be then reimbursed for actual out-of-pocket expense incurred by the plaintiff in connection with the concentrates so stockpiled and then removed by Metals Reserve Company.

VII.

Metals Reserve Company was dissolved by an Act of Congress, dated June 30, 1945, 15 U.S.C.A., Section 611, and by said Act all of its functions, commitments and liabilities were transferred to and assumed by defendant, Reconstruction Finance Corporation.

VIII.

That between August 9, 1944, the date of said contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the plaintiff upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$14,595.39, and subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$40,268.71.

That plaintiff has heretofore made demand upon the defendant for the payment of said sums, but that neither all nor any part thereof has been paid,

and plaintiff alleges that said sums, amounting in the aggregate to the sum of \$54,864.10, together with interest thereon at the rate of 6% per annum from October 12, 1948, is now due and owing from defendant to the plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$54,864.10, together with interest thereon at the rate of 6% per annum from October 12, 1948, and for plaintiff's costs incurred herein.

/s/ CHAS. E. HORNING,
BROWN & PEACOCK,
/s/ By ROBERT E. BROWN,
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed July 10, 1952.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Chas. E. Horning, Wallace, Idaho; and Brown & Peacock, Kellogg, Idaho, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: July 10, 1952.

[Seal]

ED. M. BRYAN,

Clerk of Court

/s/ By LONA MAUSER,

Deputy Clerk

Return on Service of Writ attached.

[Endorsed]: Filed August 1, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the Defendant, Reconstruction Finance Corporation, by their attorneys, Stimson & Donahue, and moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against Defendant upon which relief can be granted.

2. For the reason that the United States of America is an indispensable party defendant.

/s/ STIMSON & DONAHUE,

Attorneys for Defendant Reconstruction Finance Corporation

Acknowledgment of Service attached.

[Endorsed]: Filed October 9, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 5, 1952

This cause came on regularly this date in open Court for hearing on Defendant's motion to dismiss.

Stimson and Donahue representing the Defendant and Chas. E. Horning and Robert Brown representing the Plaintiff. At this time Counsel for the Defendant confessed his motion with out merit. Therefore the Motion was ordered stricken and the Defendant given 60 days to answer.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSE

Comes now the Defendant, Reconstruction Finance Corporation, and in answer to the Complaint of Plaintiff, admits, alleges and denies as follows:

I.

Defendant admits Paragraphs I, II, III, IV, and V of Plaintiff's Complaint.

II.

Answering Paragraph VI of Plaintiff's Complaint, this answering Defendant admits: "That a modification of said contract was thereafter, to-wit, on August 9, 1944, approved in writing by Plaintiff and said Metals Reserve Company providing

that said Metals Reserve Company should have the right at its sole option to remove all or any part of the zinc concentrates purchased and stockpiled by the Plaintiff for the account of Metals Reserve Company," and this answering Defendant denies all other matters contained in said paragraph.

III.

Answering Paragraph VII of Plaintiff's Complaint, this answering Defendant admits the same.

IV.

Answering Paragraph VIII of Plaintiff's Complaint, this answering Defendant admits that between August 9, 1944, the date of said contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the Plaintiff, but this Defendant denies that Plaintiff had incurred actual out-of-pocket expense in the sum of \$14,595.39 in connection therewith, and this answering Defendant specifically denies that it at any time agreed to reimburse Plaintiff for such out-of-pocket expense. Further answering said paragraph, this answering Defendant denies that subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates, upon which the Plaintiff claims to have incurred an additional out-of-pocket expense in the sum of \$40,268.71. Further answering said paragraph, this answering Defendant admits that the Plaintiff has made demand upon

it for payment in the sum of \$14,595.39, and that neither all nor any part thereof has been paid, but Defendant denies that demand has been made upon Reconstruction Finance Corporation for the further sum of \$40,268.71, representing the alleged cost of removal of 53,039.58 tons of stockpiled concentrates, and this answering Defendant specifically denies that there is any sum now due and owing from the Defendant to the Plaintiff.

Further answering said Complaint and as an Affirmative Defense thereto, this answering Defendant, Reconstruction Finance Corporation, alleges as follows:

I.

Metals Reserve Company entered into a letter agreement with Sullivan Mining Company dated June 18, 1942, covering the purchase of zinc concentrates by Sullivan for the use of Metals Reserve Company, in an amount not to exceed 1,500 tons per month, but not to exceed in the aggregate 10,000 short tons. The agreement specifically provided for Sullivan stockpiling such material "at its own expense", and also provided for the sale of same to Sullivan from time to time, as they were able to treat such concentrates. This agreement was amended at various times at Sullivan's request, in order to increase the amount of zinc concentrates that could be purchased monthly and the aggregate amount that could be purchased. By letter agreement dated July 12, 1944, the agreement was further amended in certain respects, including the following:

“If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e., the tonnage removed, weighed and handled).”

That the demand made in Paragraph VIII of Plaintiff's Complaint for the payment of \$14,595.39, represents expenses Plaintiff incurred in connection with the input of storage of concentrates “as distinguished from the removal of concentrates”, and all expenses in connection with the removal of concentrates by Metals Reserve Company and Reconstruction Finance Corporation have been fully paid to Sullivan Mining Company.

II.

That as further affirmative defense, Defendant alleges that the amendment to the original stockpiling contract made by letter agreement, dated July 12, 1944, further provides that:

“Metals Reserve may assign its interest under this contract to any other branch or agency of the Government of the United States of America, and upon such assignment such assignee shall acquire all the rights, powers and privileges of Metals Reserve hereunder, and shall be bound by all the duties and obligations of Metals Reserve here-

under, and Metals Reserve shall thereby cease to have any rights, powers, privileges, duties or obligations hereunder, it being expressly understood that any such assignment by Metals Reserve of its interest in this contract shall be subject to all the rights, powers and privileges of contractor hereunder and shall be conditioned upon such assignee's assuming all duties and obligations of Metals Reserve hereunder."

That on or about the 22nd day of October, 1948, the Plaintiff, Sullivan Mining Company, was advised by letter from Defendant that the Defendant was going to transfer and assign the physical custody of the entire Government stockpiles of zinc concentrates stored by Sullivan Mining Company to the Treasury Department, Bureau of Federal Supply, which has since become Emergency Procurement Service under General Services Administration. That said assignment was duly made and became effective on the 30th day of November, 1948. That said assignment provided, among other things, that:

"It being expressly understood and agreed that said Assignee shall hereby acquire all the rights, powers and privileges of Assignor under said agreement, as amended, and shall be bound by all the duties and obligations of Assignor under said agreement as amended, and Assignor shall hereby cease to have any rights, powers, privileges, duties or obligations under said agreement, as amended, it being further expressly understood that this assignment by Assignor of its interest in said agreement as

amended shall be and is subject to all the rights, powers and privileges of said Sullivan Mining Company under said agreement as amended, and shall be and is conditioned upon Assignee's assuming all duties and obligations of Assignor under said agreement as amended."

That all of the terms and conditions of the aforesaid assignment were accepted, approved, and agreed to by the Plaintiff herein, and that the Treasury Department (Bureau of Federal Supply) did assume all duties and obligations of Reconstruction Finance Corporation (Assignor) under the original stockpiling contract as amended. That by virtue of said assignment, the United States of America become a necessary party defendant to the above entitled action and all charges incurred in connection with the zinc concentrates remaining in the stockpile as of November 30, 1948, are chargeable to and the responsibility of the Treasury Department, Bureau of Federal Supply, which has since become the Emergency Procurement Service under General Services Administration. That if any liability exists in connection with the allegations of Paragraph VIII of Plaintiff's Complaint covering the removal of concentrates subsequent to November 30, 1948, upon which Plaintiff seeks recovery in the sum of \$40,268.71, it is the liability of the United States of America, Treasury Department, Bureau of Federal Supply, rather than the liability of the Defendant herein named.

As a further answer and affirmative defense to Plaintiff's Complaint, Defendant alleges that the

Plaintiff has been guilty of laches in failing to make any demand upon the Defendant for reimbursement for the sums alleged to be due in Paragraph VIII of Plaintiff's Complaint from the time that said stockpiling agreement was amended August 9, 1944, until claim was filed against Reconstruction Finance Corporation February 13, 1951.

Wherefore, having fully answered the Complaint of Plaintiff, Defendant, Reconstruction Finance Corporation, prays that said action be dismissed and held for naught, and that it recover its costs and disbursements.

/s/ STIMSON & DONAHUE,
Attorneys for Defendant

Duly Verified.

[Endorsed]: Filed December 26, 1952.

[Title of District Court and Cause.]

STIPULATION

The parties to the above entitled action, acting by their respective counsel, hereby stipulate that upon the trial of the said action either party may offer in evidence either carbon copies or photostatic copies of any and all letters and/or documents which such party may wish to offer without being required to produce and offer the originals of such letters or of such documents, the opposing party reserving, however, the right to object to any and all such offers upon any ground except that no objections shall be made to the authenticity thereof.

Dated the 28th day of May, 1953.

/s/ CHAS. E. HORNING,
BROWN & PEACOCK,

/s/ By ROBERT E. BROWN,
Attorneys for Plaintiff

STIMSON & DONAHUE,

/s/ By L. VINCENT DONAHUE,
Attorneys for Defendant

[Endorsed]: Filed November 2, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 2, 1953

This cause came on for trial before the Court sitting without a jury, Chas. E. Horning and Robert Brown appearing as counsel for the plaintiff, and Stimson Donahue appearing for the defendant. On motion of Stimson Donahue, Thomas B. Paine was ordered entered as associate counsel for the defendant.

After a statement of the case by counsel, Wallace G. Wolf was sworn and examined as a witness on the part of the plaintiff, and documentary evidence was introduced.

Thereupon, the case was continued until 10 o'clock a.m., Tuesday, November 3, 1953.

November 3, 1953

This cause came on for further trial before the Court sitting without a jury.

Wallace G. Wolf was recalled and further examined as a witness on the part of the plaintiff,

and documentary evidence was introduced. Thereupon, the trial was continued until 10 o'clock a.m., Wednesday, November 4, 1953.

November 4, 1953

This cause came on for further trial before the Court sitting without a jury.

Walter Wolfe and Vernon Roehl were sworn and examined as witnesses on the part of the plaintiff, and here the plaintiff rests.

Plaintiff having rested, comes now the defendant and moves the Court for judgment of dismissal. The motion was taken under advisement. Here the defendant rests and both sides close.

It was agreed that argument be submitted on brief, plaintiff to have 30 days after transcript is filed to file opening brief, defendant 30 days to answer and plaintiff 20 days to reply. After filing of briefs if counsel desire the Court will fix a date for oral argument.

The Clerk was ordered to release exhibits to respective counsel for preparing their briefs.

May 19, 1954

Upon stipulation of counsel and good cause appearing, it was ordered that the plaintiff have 20 additional days within which to file its reply brief.

[Title of District Court and Cause.]

MEMORANDUM

Clark, District Judge.

This is an action brought by Sullivan Mining Company against the Reconstruction Finance Cor-

poration. The plaintiff and Metal Reserves Company in 1942 entered into a stockpiling agreement. The terms of the agreement and the modification thereof and other understandings between the parties are somewhat ambiguous. Both the original contract and the amendment thereto could and should have been made more definite and certain.

The Metals Reserve Company was dissolved by Congress in 1945 and all of its functions, commitments and liabilities were transferred to and assumed by this defendant.

It further appears that the Defendant transferred and assigned physical custody of the entire Government stockpiles of zinc concentrates stored by the plaintiff to the Treasury Department Bureau of Federal Supply, effective November 30, 1948.

The agreement provided, in effect, that the plaintiff should be reimbursed for actual out-of-pocket expense in the stockpiling of the concentrates.

Between August 9, 1944, and December 1, 1948, plaintiff incurred actual out-of-pocket expense in the sum of \$14,595.39 and subsequent to December 1, 1948, the plaintiff incurred actual out-of-pocket expense in the sum of \$40,268.71.

Without going into all the technical questions involved, this court feels that it would work a great injustice on the plaintiff here to say that the money actually spent in out-of-pocket expenses for the benefit of the defendant should be borne by plaintiff without reimbursement.

Defendant contends that it can in no way be held

liable for the \$40,268.71 amount. It appears that the defendant only transferred physical custody to the Bureau of Federal Supply and nothing is said about contractual commitments or liability. These are all government agencies and the assets of such agencies all would seem to have the same source.

Under its contract with the Government the plaintiff is entitled to reimbursement for the expenses which it incurred in constructing and maintaining the storage bins in which the government concentrates were stockpiled and for the expenses incurred in unloading and loading the concentrates from the railroad cars into the bins.

Plaintiff is entitled to judgment against the defendant as prayed for in the complaint. Counsel for the plaintiff may prepare Findings of Fact, Conclusions of Law and Judgment, submitting the original to the Court for its approval and serving a copy on opposing counsel.

Dated this 22nd day of July, 1954.

[Endorsed]: Filed July 22, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, Reconstruction Finance Corporation, and moves the Court for a new trial in the above entitled matter upon the grounds and for the reason that:

1. Error in law occurring at the trial and excepted to at the time by the defendant.

2. Insufficiency of the evidence to justify the decision of the Court and that the decision of the Court as made and entered, is against the law.

3. Error in the assessment of the amount of recovery, in that the assessment against defendant should in no event have exceeded \$14,595.39.

4. That the defendant, Reconstruction Finance Corporation has not been given substantial justice by virtue of the Court's decision.

Dated this 9th day of August, 1954.

/s/ L. VINCENT DONAHUE,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial and the Court, having heard the evidence and considered the stipulations of the parties and having considered the briefs filed by counsel for the respective parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

I.

The plaintiff, Sullivan Mining Company, an Idaho corporation, owns and operates an electrolytic zinc smelter at Silver King, Shoshone County, Idaho, and has operated said smelter continuously since

1928. The plaintiff also owns and under separate management it operates the Star Mine, a large zinc producer, in Shoshone County. At all of the times involved in this suit the plaintiff was engaged in processing at its said smelter the concentrates produced from zinc ores mined at its own Star Mine and in purchasing and smelting concentrates produced from various other zinc mines in Shoshone County.

II.

On February 9, 1942, the United States being then engaged in the so-called Second World War, the Office of Price Administration issued a "Release" announcing that for the purpose of expanding the output of copper, lead and zinc by domestic mine operators the United States Government, acting through Metals Reserve Company (a corporation created by the Reconstruction Finance Corporation under the Reconstruction Finance Corporation Act), would for a period of two and one-half years beginning as of February 1, 1942, pay certain premium prices for all copper, lead and zinc which should be produced over certain specified quotas based upon 1941 production from the particular properties to which such quotas should be assigned. Such announcement was followed by a letter dated February 12, 1942, from said Metals Reserve Company to the plaintiff, explaining in detail the operation of the "premium price plan" and requesting the plaintiff to act as agent of Metals Reserve Company in the administration of the program. The agency was accepted by the plaintiff.

III.

Pursuant to the plaintiff's acceptance of such agency and with full knowledge that the plaintiff's smelting capacity was inadequate to treat the quantities of zinc concentrates which even then were being tendered to Sullivan, and with full knowledge that Sullivan was already purchasing and stockpiling for its own account its normal emergency reserve of zinc concentrates, the Metals Reserve Company, itself, caused to be drafted in Washington and signed by its Executive Vice President and then forwarded to Sullivan Mining Company for its approval and execution the contract which was admitted in evidence in this case as Plaintiff's Exhibit No. 3. This contract, in the form of a letter, was dated June 18, 1942. It was executed by Sullivan in the exact form in which it was submitted.

IV.

Said agreement provided that Sullivan, as agent for Metals Reserve Company, should purchase for the account of Metals Reserve Company zinc concentrates in specified monthly quantities. These concentrates were to be stockpiled by the plaintiff at its own expense, and were to be sold to the plaintiff from time to time as the plaintiff should be able to treat the same. In effect, Metals Reserve Company was to furnish to its agent the funds with which to purchase concentrates with the understanding that the funds so furnished by Metals Reserve Company would be repaid by the plaintiff and the plaintiff would then treat the concentrates

as if it had purchased and stockpiled them for its own account in the first instance.

V.

It was the understanding of both parties to said contract that in consideration of the plaintiff's stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations.

VI.

The aforesaid contract of June 18, 1942, originally provided for the stockpiling of not to exceed 1,500 short tons of concentrates per month and not to exceed 10,000 short tons in all but that the Government's premium price plan so thoroughly accomplished its intended purpose that the number of shippers of zinc concentrates to the plaintiff's smelter increased from 15 to 45 or more and that the quantity of concentrates being tendered to the plaintiff, over and above the capacity of its smelter, so constantly increased that in order to avoid the curtailment of zinc mining the Government from time to time increased the tonnages which the plaintiff was authorized to purchase and stockpile for the Government's account.

VII.

Except for the various modifications of the contract increasing the tonnages of concentrates which plaintiff was authorized to purchase and stockpile for Metals Reserve Company, the contract of June 18, 1942, remained in its original form until it was

amended, as aforesaid, on July 12, 1944, giving Metals Reserve Company the right to remove from the stockpiles and ship to other smelters for treatment all or any portion of the concentrates purchased and stored by the plaintiff for the account of Metals Reserve Company. The July 12, 1944 amendment of the contract was introduced in evidence as Plaintiff's Exhibit No. 6.

VIII.

The original and the amended contracts between the plaintiff and Metals Reserve Company were amended about July 6, 1945 by substituting the defendant Reconstruction Finance Corporation for Metals Reserve Company as a party to said contracts. This amendment was evidenced by certain telegrams and letters which were introduced as evidence as a part of Plaintiff's Exhibit No. 9.

IX.

It was the plaintiff's understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944 was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stockpiling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment.

X.

The duration of the Government's stockpiling

as if it had purchased and stockpiled them for its own account in the first instance.

V.

It was the understanding of both parties to said contract that in consideration of the plaintiff's stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations.

VI.

The aforesaid contract of June 18, 1942, originally provided for the stockpiling of not to exceed 1,500 short tons of concentrates per month and not to exceed 10,000 short tons in all but that the Government's premium price plan so thoroughly accomplished its intended purpose that the number of shippers of zinc concentrates to the plaintiff's smelter increased from 15 to 45 or more and that the quantity of concentrates being tendered to the plaintiff, over and above the capacity of its smelter, so constantly increased that in order to avoid the curtailment of zinc mining the Government from time to time increased the tonnages which the plaintiff was authorized to purchase and stockpile for the Government's account.

VII.

Except for the various modifications of the contract increasing the tonnages of concentrates which plaintiff was authorized to purchase and stockpile for Metals Reserve Company, the contract of June 18, 1942, remained in its original form until it was

amended, as aforesaid, on July 12, 1944, giving Metals Reserve Company the right to remove from the stockpiles and ship to other smelters for treatment all or any portion of the concentrates purchased and stored by the plaintiff for the account of Metals Reserve Company. The July 12, 1944 amendment of the contract was introduced in evidence as Plaintiff's Exhibit No. 6.

VIII.

The original and the amended contracts between the plaintiff and Metals Reserve Company were amended about July 6, 1945 by substituting the defendant Reconstruction Finance Corporation for Metals Reserve Company as a party to said contracts. This amendment was evidenced by certain telegrams and letters which were introduced as evidence as a part of Plaintiff's Exhibit No. 9.

IX.

It was the plaintiff's understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944 was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stockpiling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment.

X.

The duration of the Government's stockpiling

program was extended from time to time and was finally terminated on June 30, 1947, and no concentrates were stockpiled for the Government after that date. The plaintiff had been authorized to stockpile for the Government 80,000 wet tons of concentrates and actually did stockpile 72,263.64 wet tons, and that the plaintiff actually and necessarily expended out of its own funds the sum of \$54,864.10 in the construction and maintenance of the bins in which said concentrates were stockpiled and in weighing and unloading said concentrates into said bins as the same were delivered to the plaintiff by the various shippers. The amount of the plaintiff's said expenditures was not disputed by the defendant.

XI.

No portion of these concentrates was withdrawn from the Government stockpiles for processing by the plaintiff. Although the plaintiff at all times kept its smelter operating at full capacity except during a short period in which even with its employment of women on manual labor jobs and with its employment of Italian internees and coal miners who had been released from the Army to work in the metal mines, the plaintiff was unable to obtain sufficient labor to keep all of the units of its plant in full operation.

XII.

It was not until about February 19, 1948, and after the termination of its stockpiling program that the Government indicated to the plaintiff its intention to ship to other smelters for processing

any of the concentrates which had been stockpiled by the plaintiff under its contracts with the Government.

XIII.

Between February 19, 1948 and December 31, 1948 the defendant Reconstruction Finance Corporation caused approximately 19,224.06 wet tons of concentrates to be removed from the stockpiles and shipped to other smelters for processing.

XIV.

While the plaintiff's contract with defendant Reconstruction Finance Corporation were in full force and effect the defendant on October 22, 1948 advised the plaintiff by letter (Plaintiff's Exhibit No. 17) that the defendant was turning the physical custody of the remaining stockpiled concentrates over to the Bureau of Federal Supply, effective October 31, 1948. This latter date was subsequently advanced to December 1, 1948. (Plaintiff's Exhibit No. 18).

XV.

On or about November 30, 1948, the defendant Reconstruction Finance Corporation executed what purported to be an assignment of its contracts with the plaintiff to the Bureau of Federal Supply (Plaintiff's Exhibit No. 22). This purported assignment contained a provision to the effect that the assignment "shall be and is conditioned upon assignee's assuming all duties and obligations of assignor under said agreement, as amended".

XVI.

At all times from and after the date on which the plaintiff was notified by the defendant Reconstruction Finance Corporation that the Government intended to ship at least a portion of the stockpiled concentrates to other smelters for processing the plaintiff persistently insisted upon its understanding that under the terms of its contract and amended contract with the defendant, plaintiff was entitled to reimbursement for all expenses incurred by the plaintiff in stockpiling for the Government any and all concentrates which should be removed from the stockpile and shipped to other smelters for processing and the plaintiff did not at any time release the defendant Reconstruction Finance Corporation from its obligation to so reimburse the plaintiff. The fact that all of the Government agencies involved in the matter also understood that the plaintiff was entitled to reimbursement for all expenses incurred by it in stockpiling all concentrates which should be removed and which had been removed from the stockpiles is evidenced by correspondence which passed between the plaintiff and these various Government agencies between October 22, 1948 and March 1, 1950 and is further evidenced by the fact that no question in this regard was raised by any of these Government agencies at the conferences between these agencies and representatives of the plaintiff in Washington as late as February 17, 1950, and is evidenced by the further fact that during the year 1949 the question, not as to whether the plaintiff was entitled to such

reimbursement but as to how the liability for the reimbursement of the plaintiff for all stockpiling expenses should be apportioned between the defendant Reconstruction Finance Corporation and the Bureau of Federal Supply, was the subject of various conferences in Washington between these two Governmental agencies.

XVII.

In 1949 the plaintiff completed the construction and installation of an additional, or fourth, electrolytic unit with necessary auxiliary enlargement of the remaining parts of the smelting plant at a cost of approximately \$2,500,000.00. With that increased capacity the plaintiff was in a position to process the concentrates which were being currently shipped to the plaintiff as well as the concentrates which then remained in the Government stockpiles amounting to approximately 48,000 wet tons. The plaintiff offered to purchase these remaining stockpiled concentrates but its offer was not accepted and said concentrates were removed from the stockpiles by the Government and shipped and sold to other smelters, leaving the plaintiff with an excess of smelting capacity which it was able to utilize only by searching for and purchasing additional concentrates as a replacement of the Government concentrates that were so removed and shipped elsewhere for processing.

XVIII.

It was not until on or about March 1, 1950 that the plaintiff was advised that the Government and all of its involved agencies denied all liability for

the reimbursement of the plaintiff for any of its stockpiling expenses.

XIX.

As between the plaintiff and the defendant Reconstruction Finance Corporation the purported assignment from the defendant to the Bureau of Federal Supply on November 30, 1948, never became effective, except to transfer the physical custody of the remaining concentrates to the Bureau of Federal Supply, by reason of the fact that the condition of the assignment, that is to say, the assumption by the Bureau of Federal Supply of all duties and obligations of the defendant under the Government's contracts with the plaintiff was not only never fulfilled but ultimately such obligations were expressly repudiated.

Conclusions of Law

I.

That this Court has jurisdiction of this action and the parties hereto.

II.

That as between the plaintiff and the defendant Reconstruction Finance Corporation the purported assignment from the defendant to the Bureau of Federal Supply on November 30, 1948, never became effective, except to transfer the physical custody of the remaining concentrates to the Bureau of Federal Supply, by reason of the fact that the condition of the assignment, that is to say, the assumption by the Bureau of Federal Supply of all

duties and obligations of the defendant under the Government's contracts with the plaintiff was not only never fulfilled but ultimately such obligations were expressly repudiated.

III.

That the plaintiff Sullivan Mining Company is entitled to judgment against the defendant Reconstruction Finance Corporation or for the sum of \$54,864.10 together with interest thereon at 6 percent per annum from the 12th day of October, 1948 and for plaintiff's costs.

Dated August 26th, 1954.

/s/ CHASE A. CLARK,
District Judge

[Endorsed]: Lodged August 16, 1954.

[Endorsed]: Filed August 26, 1954.

In the United States District Court for the District
of Idaho, Northern Division

No. 1868

SULLIVAN MINING COMPANY, a corporation,
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation, Defendant.

JUDGMENT

The Court having heretofore filed its opinion in this case and findings of fact and conclusions of

law therewith having been signed and filed, and good cause appearing,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff Sullivan Mining Company have and recover from the defendant Reconstruction Finance Corporation the sum of \$54,-864.10 with interest thereon at the rate of 6 percent per annum from the 12th day of October, 1948, together with plaintiff's costs.

Dated August 26th, 1954.

/s/ CHASE A. CLARK,
District Judge

[Endorsed]: Lodged August 16, 1954.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, Reconstruction Finance Corporation, and moves the Court for a new trial in the above entitled matter upon the grounds and for the reason that:

1. Error in law occurring at the trial and excepted to at the time by the defendant.

2. Insufficiency of the evidence to justify the decision of the Court and that the decision of the Court as made and entered is against the law.

3. Error in the assessment of the amount of recovery in that the assessment against defendant should in no event have exceeded \$14,595.39.

4. That the defendant, Reconstruction Finance Corporation has not been given substantial justice by virtue of the Court's decision.

Dated this 28 day of August, 1954.

L. VINCENT DONAHUE,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

MINUTES OF THE COURT

October 11, 1954

This cause came on for hearing on Motion for New Trial, Messrs. Robert E. Brown and Chas. E. Horning appearing for the plaintiff, and L. Vincent Donahue appearing for the defendant.

After hearing counsel, the Court took the matter under advisement.

[Title of District Court and Cause.]

ORDER

This matter is before the Court at this time on Defendant's Motion for New Trial. Oral argument was heard, and the matter was taken under advisement. The Court has fully considered the grounds urged in support of the motion, and is of the opinion that the Motion should be denied.

It appeared to the Court at the time decision was rendered in this matter, and does at the present time, that any agency involved in the stockpiling was a government agency from the beginning agreement until the conclusion of the stockpiling, and that the present defendant Reconstruction Finance Corporation is the agency liable, as the purported assignment to Bureau of Federal Supply only transferred physical custody and the terms and conditions of the agreement were never fulfilled. It was the government concerned in all instances.

Now, Therefore, it is Hereby Ordered that the Motion for a New Trial be and the same is hereby denied.

Dated this 15th day of February, 1955.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District
of Idaho.

[Endorsed]: Filed Feb. 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Reconstruction Finance Corporation, a corporation created by an act of Congress, of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government, the defendant above-named does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit

from the final judgment entered in this action, August 26, 1954, and filed for record in the above-entitled Court on said date and from each and every part thereof, and from all rulings of the Court; and from that certain order in the above-entitled cause signed by the Court, February 15, 1955, and filed for record in said Court on said date, denying defendants' Motion for a new trial, and from each and every error of law committed by the Trial Court.

Dated this 10th day of March, 1955.

/s/ L. VINCENT DONAHUE,
/s/ STIMSON & DONAHUE,
/s/ TOM B. PAINE,

Attorneys for Defendant
and Appellant.

[Endorsed]: Filed March 12, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD

Comes now, Reconstruction Finance Corporation, a corporation organized and existing by an act of Congress, of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government, and pursuant to the provisions of Rule 75 (a) of the Federal Rules of Civil Procedure, and hereby designates for inclusion the complete record of all proceedings, evidence and exhibits in the above-entitled

action to constitute the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit.

The Clerk of the above-named Court is hereby directed to prepare, certify and transmit to said Circuit Court of Appeals the above designated complete record and all the proceedings, exhibits and evidence in said action.

Dated this 10th day of March, 1955.

/s/ L. VINCENT DONAHUE,
/s/ STIMSON & DONAHUE,
/s/ TOM B. PAINE,
Attorneys for Defendant
and Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1955.

[Title of District Court and Cause.]

MOTION TO WITHDRAW EXHIBITS

Comes now the Defendant, Reconstruction Finance Corporation through its attorney, L. Vincent Donahue, and moves the Court for an Order permitting all the exhibits introduced in the above entitled trial to be withdrawn and mailed to the Defendant and permitting the Defendant to examine the same for a period of ten (10) days in

connection with Defendant's preparation of its designation of the portions of the record which Defendant and Appellant thinks necessary for consideration by the Circuit Court of Appeals.

This Motion is based upon the records and files herein and upon the Affidavit of L. Vincent Donahue hereto attached and made a part hereof.

/s/ L. VINCENT DONAHUE,
Attorney for Defendant
and Appellant.

State of Washington,
County of Spokane—ss.

L. Vincent Donahue, being first duly sworn on oath, deposes and says: That he is one of the attorneys for the Defendant and Appellant, Reconstruction Finance Corporation in the above entitled action. That Notice of Appeal to the Circuit Court of Appeals was duly filed in the above entitled Court on the 12th day of March, 1955. That the Defendant and Appellant desires to prepare forthwith a designation of portions of the record which Appellant thinks necessary for consideration by the Circuit Court of Appeals and the designation of that portion of the record to be included in the printed record to be prepared by the Clerk of the Circuit Court of Appeals. That it will be impossible for the attorneys for Appellant to properly prepare said designation without the careful examination of the exhibits introduced in the trial of said case.

/s/ L. VINCENT DONAHUE,

Subscribed and sworn to before me this 16th day of March, 1955.

[Seal] /s/ EARL E. STIMSON,
Notary Public in and for the State of Washington,
residing at Spokane.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1955.

[Title of District Court and Cause.]

ORDER TO WITHDRAW EXHIBITS

This matter coming on regularly for hearing upon the Motion of L. Vincent Donahue, one of the attorneys for Reconstruction Finance Corporation, the Defendant and Appellant in the above entitled action requesting the withdrawal of the exhibits in the trial of the above entitled action for examination in connection with the preparation of the designation of the portions of the record to be printed in the Circuit Court of Appeals, and after hearing said Motion and being fully advised in the premises.

It is hereby ordered, adjudged and decreed that all of the exhibits introduced in said cause be mailed to L. Vincent Donahue, 421 Symons Building, Spokane, Washington and that he be allowed to examine said exhibits for a period of ten days and that said records then be returned forthwith to the Clerk of the United States District Court, at Boise, Idaho, or Coeur d'Alene, Idaho.

Done in open court this 21st day of March, 1955

/s/ FRED M. TAYLOR

Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1955.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It is ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is extended to May 21st, 1955.

/s/ CHASE A. CLARK,

Chief District Judge.

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and

as are necessary to the appeal under Rule 75 (RCP) to-wit:

1. Complaint.
2. Summons with return attached.
3. Motion to Dismiss.
4. Minutes of the Court on November 5, 1952.
5. Answer and Affirmative Defense.
6. Stipulation re: copies of documents offered in evidence.
7. Minutes of the Court of November 2, 1953.
8. Minutes of the Court of November 3, 1953.
9. Minutes of the Court of November 4, 1953.
10. Minutes of the Court of May 19, 1954.
11. Memorandum Opinion, Judge Clark.
12. Affidavit of Service.
13. Motion for New Trial filed Aug. 18, 1954.
14. Findings of Fact and Conclusions of Law.
15. Judgment.
16. Motion for New Trial filed Sept. 3, 1954.
17. Minutes of the Court of Oct. 11, 1954.
18. Order Denying Motion for New Trial.
19. Notice of Appeal.
20. Designation of Contents of Record.
21. Motion to Withdraw Exhibits.
22. Order to Withdraw Exhibits.
23. Order Extending Time for Docketing Appeal.
24. Transcript of Testimony.
25. Exhibits Nos. 1 to 33 inclusive and 35 to 40 inclusive.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 2nd day of May 1955.

[Seal]

ED. M. BRYAN,
Clerk.

/s/ By LONA MAUSER,
Deputy.

In the United States District Court for the District
of Idaho, Northern Division

No. 1868

SULLIVAN MINING COMPANY, a corporation,
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

This cause was tried before the Honorable Chase A Clark, sitting without a jury, at Coeur d'Alene, Idaho, on November 2, 1953.

Appearances: Chas. E. Horning, Wallace, Idaho, Robert E. Brown, Kellogg, Idaho, attorneys for the Plaintiff. L. Vincent Donahue, 421 Symons Bldg., Spokane, Wash., Tom B. Paine, Wallace, Idaho, Attorneys for the Defendant.

November 2, 1953, 10:00 o'clock a.m.

Mr. Donahue: At this time I would like to have the record show that Thomas B. Paine, who is an Idaho attorney, will be associated with me in the trial of this case.

The Court: The record may so show.

(Statement made by Mr. Horning as to the issues to be presented.)

WALLACE G. WOLF

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Brown): Where do you reside, Mr. Wolf?

A. I reside at the Silver King site of the zinc plant of the Sullivan Mining Company.

Q. Is that in Idaho?

A. Yes, sir, close to Kellogg.

Q. And by whom are you employed?

A. The Sullivan Mining Company.

Q. In what capacity?

A. I am superintendent of the Electrolytic Zinc Plant of the Sullivan Mining Company. [1*]

Q. Where is that Electrolytic Zinc Plant located?

A. Up Government Gulch, approximately three miles from Kellogg.

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Wallace G. Wolf.)

Q. Will you explain the operation of that plant, what its purpose is?

A. The plant treats zinc concentrates and produces a special high grade electrolytic zinc metal which it sells. In the processing of those concentrates it also produces electrolytic cadmium metal which it also sells. In the treatment of the concentrates, after the zinc is removed by a process of leaching there is a residue containing the portion of the concentrate that is not soluble in sulphuric acid which is used as the leaching agent. That residue contains lead, silver and a small quantity of gold. That residue is shipped to the Bunker Hill and sold to the Bunker Hill smelter, of the Bunker Hill and Sullivan Mining and Concentrating Company. In the electrolytic cadmium plant there is a by-product of copper material which has been sold to the Tacoma Smelter of the American Smelting and Refining Company.

Q. Mr. Wolf, from time to time in the course of this hearing reference will be made to the Bunker Hill and Sullivan Mining and Concentrating Company, what, if any relation exists between the Sullivan Mining Company [2] and the Bunker Hill and Sullivan Mining and Concentrating Company?

A. The Sullivan Mining Company is owned by the Bunker Hill and Sullivan Mining and Concentrating Company and the Hecla Mining Company,—each company having a 50 per cent ownership. The Sullivan Mining Company operates the Electrolytic Zinc Plant and it also operates its own Star

(Testimony of Wallace G. Wolf.)

Mine. The management of the zinc plant is under the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company; Mr. Haefner who is my superior,—the operation of the Star Mine is under the management of the Hecla Mining Company.

Q. By that do you mean that the stock of the Hecla Mining Corporation is owned equally by these other two companies? A. That is correct.

Q. How long have you acted as superintendent of their Electrolytic Zinc Plant?

A. Since the project was conceived and I have been the superintendent since the plant started in operation, in 1928, I have been superintendent ever since.

Q. You were acting in that capacity in 1942?

A. I was.

Q. Mr. Wolf, there has been handed to you what was marked as Plaintiff's Exhibit No. 1 for the purpose of [3] identification. I will ask you what that is?

A. That is a release from the Office of Price Administration under date of February 8, 1942. It sets out some of the detail of the over quota production of copper, lead and zinc under the premium price plan, whereby the production in excess of quotas which were to be established for various mines or groups of mines, will be paid at certain stipulated premium prices for lead, copper and zinc.

(Testimony of Wallace G. Wolf.)

Q. Had you any information with respect to the premium price plan prior to that announcement?

A. I had received an earlier release announcing that such a price plan would be set up, a premium price plan.

Q. Prior to this release of February 19, 1942, did you have any official notice of the plan?

A. No, just a notice that such a plan was in contemplation and would be announced later, the details would be announced later.

Q. Did this serve as the first specific information to you as to what a plan would be or would amount to? A. It did.

Mr. Brown: We offer in evidence Plaintiff's Exhibit No. 1.

Mr. Donahue: If your Honor please, we [4] have found in this case and it is true of counsel for both sides, that much of the original correspondence between these two parties was not available, some had been mislaid, some lost and as a consequence we have entered into a stipulation with respect to the introduction in evidence of carbon copies or other copies of the various correspondence and I think that the stipulation possibly should be filed.

The Court: That stipulation may be filed.

Mr. Donahue: There is no objection on our part to Plaintiff's Exhibit No. 1.

The Court: It may be admitted.

Q. Mr. Wolf, you have been handed, by the bailiff, an instrument marked as Plaintiff's Exhibit

(Testimony of Wallace G. Wolf.)

No. 2 for identification and I will ask you what that is?

A. It is a letter under date of February 12, 1942, addressed to the Sullivan Mining Company, 1022 Crocker Building, San Francisco, California, and it is signed by G. Temple Bridgman, executive vice president of the Metals Reserve Company, and it sets out the details of handling the premium price plan for over-quota production of lead, copper and zinc and asks if the company will be willing to act as an agent in the pursuit of that plan. [5]

Mr. Brown: I offer this exhibit in evidence at this time.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Mr. Wolf, did your company accept the appointment as agent for the Metals Reserve Company? A. Yes, sir, we did.

Q. In your company's capacity as agent for the Metals Reserve Company to handle the premium price plan, will you explain briefly to the Court what you did for them?

A. The plan set forth that as agent we were to receive zinc concentrates which were normally tendered to us. We were to submit to the Metals Reserve Company details of settlement, contracts and settlement schedules for those concentrates. We were to buy the concentrates and pay for them in the normal course of business. We were to receive from the shippers statement as to their over-quota production; we were to be given information about

(Testimony of Wallace G. Wolf.)

what their individual quotas were and we were to handle, for the government, the payment to those individual shippers for their over-quota production of zinc and metals contained in these zinc concentrates which were shipped to us in excess of their normal quotas. The Metals Reserve Company arranged with us to have a revolving fund and we [6] paid those shippers for the over-quota premium price from that fund and we, of course, had to send to the Metals Reserve Company certain statements showing the settlement, the tonnage and detail to justify those payments.

Q. Who established the quota?

A. The Metals Reserve Company.

Q. Did your company receive any part of that premium price that you were paying those shippers?

A. No, we did not.

Q. Plaintiff's Exhibit No. 2,—or is it Plaintiff's Exhibit No. 1, it sets forth that the purpose of this plan was to stimulate domestic production of copper, lead and zinc. After your acceptance of the agency appointment from the Metals Reserve Company, what was your experience as to whether it did stimulate production?

A. There was a great stimulation of production. Mines which had regularly shipped to us zinc concentrates prior to this plan increased their shipments and there were numerous other productions that were offered to us and which we accepted and received. We had, as I recall, prior to that plan, something like 15 regular shippers and because of

(Testimony of Wallace G. Wolf.)

that plan we eventually had some 45 to 47 shippers to our plant of those zinc concentrates.

Q. Was your company paid any compensation for acting as agent for the Metals Reserve Company? [7] A. None whatever.

Q. Mr. Wolf, the bailiff has handed you Plaintiff's Exhibit No. 3 marked for identification, I will ask you what that is?

A. That is a letter written under date of June 18, 1942, to the Sullivan Mining Company, Kellogg, Idaho, from the Metals Reserve Company signed by G. Temple Bridgman, executive vice president of the Metals Reserve Company. This was a letter covering the contract for the handling of the premium price concentrate. The letter, in its concluding paragraph says, "If the foregoing is acceptable to you, please sign and return". It was signed by the Sullivan Mining Company by Mr. Stanly A. Easton, vice president.

Mr. Brown: We offer in evidence Exhibit No. 3.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Prior to June 18, 1942, the date of Exhibit No. 3, had you stockpiled any zinc concentrates for and on behalf of the Metals Reserve Company?

A. No.

Q. Exhibit No. 3 states in the course of the exhibit, that the government was aware at that time that you didn't have adequate facilities for the processing of all of [8] the production then com-

(Testimony of Wallace G. Wolf.)

ing from your district, was the inadequacy a result of this stimulated production?

A. We were tendered more concentrates than we could process so it was the stimulation that caused us to receive concentrates above and beyond our ability to process.

Q. After the execution or acceptance by your company of this contract, Plaintiff's Exhibit No. 3, did you start to stockpile zinc concentrates?

A. We did.

Q. Where and how did you stockpile the concentrates?

A. The zinc plant is in a narrow gulch. At that time we had no facilities for stockpiling any concentrates above the capacity of its receiving bins. We had previously stored such concentrates on the grounds of the Bunker Hill smelter; they had trackage, some bin space, trains and cranes for removing concentrates from the cars and loading them into cars. We stockpiled at the Bunker Hill smelter and the Bunker Hill charged us the cost of doing that work.

Q. Do you mean that immediately after this contract of June 18, 1942, at the commencing of your stockpiling you were using facilities then in existence?

A. We had stockpiled previous to entering into this contract, certain tonnage of zinc concentrate, using the facilities of the Bunker Hill smelter and as [9] these premium price plan concentrates

(Testimony of Wallace G. Wolf.)

started coming in we used what bins were then available, some of them had to be repaired and maintained, then as the tonnage increased, shortly afterward, we used some of the bins that were normally used by the Bunker Hill and Sullivan Mining and Concentrating Company in its operation,—bins that they used to store coke, flux and by-products. They made some of those bins available to us and we stored concentrates in those bins. The tonnage continued to increase and we then had to provide additional storage. The smelter previous to that time had prepared a site for its use in what is called Magnet Gulch. They had done a considerable amount of filling and leveling in this gulch with the intention of using that ground in the operation of the smelter. We used that ground and bins were built on that ground to store the excess zinc concentrates which we were receiving under this contract. The bins were of wood, we laid fills down and put in a floor of lumber so that the concentrates would not be on the rough and uneven ground, then we built partitions also of lumber because the concentrates had to be segregated in accordance to the individual shippers, they had to be kept separate. This was during the war years when it was difficult to get supplies, there was a shortage of lumber, and there was a shortage of [10] labor. The Sullivan Mining Company Zinc Plant provided the lumber and the smelter used its labor, carpenters and so on, to build the bins. It was under the stress of war time and we had to pursue those methods in order to

(Testimony of Wallace G. Wolf.)

have space available for those concentrates as they came in and as we received them.

Q. As I understand it, in the immediate vicinity and on your own ground, the Sullivan Mining Company did not have room for the storage of those concentrates and they were stockpiled, actually, on the ground of the Bunker Hill smelter?

A. That is right.

Q. What is the Bunker Hill smelter?

A. The Bunker Hill smelter is owned by the Bunker Hill and Sullivan Mining and Concentrating Company which, as I have testified earlier, owns one half of the Sullivan Mining Company. The Sullivan Mining Company is an affiliate and Mr. Haefner is the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company and also of the zinc plant, the result is that the Bunker Hill smelter and the zinc plant cooperate very closely because of the close connection between the two.

Q. Does the Bunker Hill smelter smelt zinc as its principal process?

A. No, its principal process is the smelting of lead [11] concentrate. I might explain that in the Coeur d'Alene district from which normally the bulk of our intake is received, the ores are mixed lead and zinc ores and in the process of concentrating in mills, a lead concentrate is produced which in many instances goes to the Bunker Hill smelter and the zinc comes to the zinc plant of the Sullivan Mining Company.

(Testimony of Wallace G. Wolf.)

Q. Mr. Wolf, were you charged by the Bunker Hill smelter for the labor that you spoke of, in connection with the storage? A. We were.

Q. Was that paid?

A. Yes, we paid it.

Q. Did I understand from you that the facilities actually used for unloading the concentrates into the stockpile was that of the Bunker Hill smelter? A. Yes, sir, entirely so.

Q. What type of machine is that?

A. They have a locomotive crane that operates on a railroad track; the cars are switched in that track and the concentrates are removed by this crane from the cars into the stockpile.

Q. It was through that facility that the concentrates were unloaded into the stockpile?

A. That is correct. [12]

Q. Were you charged for the use of the crane in unloading the concentrates?

A. Yes, we were.

Q. Did you pay it?

A. We did, yes, sir.

Q. Mr. Wolf, Plaintiff's Exhibit No. 3 which was the contract under which you commenced stockpiling for the Metals Reserve Company provided that you should stockpile at the rate of not to exceed 1500 short tons per month. The time or period of the contract was seven months and you were to stockpile for them a maximum of 10,000 tons. Subsequent to its execution was there a modification of that contract with respect to the period of time it

(Testimony of Wallace G. Wolf.)

should run and the amount of tonnage you were authorized to stockpile?

A. Yes, sir, in the ensuing period of time the original contract was amended to increase the tonnage to be stored and also the length of time that it was to run, the time was extended.

Mr. Brown: By agreement with counsel we have here Exhibit marked Plaintiff's Exhibit No. 4 and we offer this in evidence.

Mr. Donahue: We have no objection to the exhibit.

The Court: It may be admitted. [13]

Q. Mr. Wolf, Exhibit No. 4 extended the contract, that is, in sequence it finally extended the contract to July 18, 1944, to allow for the increase in tonnage to 25,000 tons. At that time,—was that a continuing program of stockpiling?

A. It was a continuous program of stockpiling, yes.

Q. So that after the entry of the contract in June of 1942, you just continued receiving concentrates and stockpiling them to the account of the Metals Reserve Corporation?

A. That is correct.

Q. What effect, Mr. Wolf, did the stimulation of production of zinc from the mines in the Coeur d'Alene district have upon the average of zinc concentrate?

A. Because of the premium price plan the mines produced an increased tonnage of concentrate. With particular reference to the Pine Creek section of the

(Testimony of Wallace G. Wolf.)

Coeur d'Alene district there were a number of those small companies that had inadequate mills, they were trying to put as much ore through those mills as they possibly could and the result was that the grade of concentrate was lowered in zinc content and also there were some tailings in the main valley of the Coeur d'Alene River that had been there for many years, they were being processed in many instances and they also gave a lower grade of concentrate [14] than we had generally received. We, at the zinc plant, received these concentrates and in furtherance of the war effort we processed as large a tonnage of these low grade concentrates as we could. We had to commingle them with the better grade concentrates and there was only a limited percentage of the total that we could process in our plant but we endeavored to process the maximum tonnage of those concentrates that we possibly could.

Q. With respect to the stockpile and the concentrates that were put into the stockpile, were those concentrates coming from the various properties that you put in the stockpile all commingled?

A. No. Because of the inadequate storage, the inadequate number of bins that we had available, we attempted to receive and process the smaller productions and we only put into the stockpile the production from the larger producers, the larger shippers, as a matter of fact the concentrates that we put into the Metals Reserve Company stockpile were limited to a very few producers. The concen-

(Testimony of Wallace G. Wolf.)

trates from each shipper had to be maintained separate and apart from any and all other shippers and for that reason it was necessary for us to stockpile only what we could not process immediately there in order not to have a small tonnage usurping a lot of space.

Q. Correct me if I am not clear on this, Mr. Wolf. As I [15] understand it, if Y concentrate and X concentrate were going into the Metals Reserve stockpile there would be separate piles or separate lots, is that right?

A. X concentrate would be segregated and kept apart from concentrate Y and during the establishment of these stockpiles, while we were storing these concentrates for the Metals Reserve account, irregular intervals we had an inspector of the government come up and look at these piles and the manner of handling them was in accordance with the instructions received from these inspectors and the general instructions that we received from the Metal Reserve at Washington.

Q. I wish you would examine that instrument you have and tell me whether or not there was any requirement as to the grade of the material you were to keep in the stockpile for the Metals Reserve, any standard?

A. Without reading this in detail, it was my understanding that the statement was made that we would purchase the concentrates which we normally received and stockpile that portion of it which was in excess of our capacity to treat.

(Testimony of Wallace G. Wolf.)

Q. So there was no specific standard set forth as to the percentage of zinc in the concentrate that you were to stockpile to their account? [16]

A. Definitely not in this contract.

Q. The bailiff has handed you two instruments, Mr. Wolf, they are marked as Plaintiff's Exhibit No. 5 for identification and I will ask you to state what they are?

A. The first is a letter dated June 3, 1944, addressed to the Sullivan Mining Company, Kellogg, Idaho, attention Mr. Stanly A. Easton. It is signed by H. DeWitt Smith, executive vice president of the Metals Reserve, re: Silver King stockpiling agreement No. AA-29 zinc concentrate. In this letter it sets forth that the Sullivan Mining Company has purchased, for the account of Metals Reserve 3,996.03 short tons of concentrate averaging about 39 per cent zinc and 15 per cent lead, and it stated that additional purchases during April and May may increase this tonnage to about 4,500 tons. It points out that they did not wish to include concentrates of this grade in their stockpile and asked us to repurchase from them this low grade concentrate.

Q. I think that you have given sufficiently of that letter, Mr. Wolf, now, the second that you have there is in response to that one, is it?

A. The second letter is written by Mr. Stanly A. Easton, vice president of the Sullivan Mining Company, in reply to this letter which I spoke of. It pointed out that [17] the Sullivan Mining Company had accepted all shipments from mines in this

(Testimony of Wallace G. Wolf.)

area that contained sufficient metal to pay its way in a genuine effort to support and stimulate to the fullest degree, all mine production. It pointed out also that during the year 1941 the Sullivan Mining Company purchased and processed 2951 tons of such sub-grade material; during the year 1942 it purchased and processed 12,337 tons of such sub-grade material; during the year 1943 it purchased and processed 12,620 tons of such sub-grade material and put into the Metals Reserve only 2753 tons which was the first of that material to be stored for the Metals Reserve Company account. It also pointed out that of the 45 different individual shippers the production of 27 of such shippers is all under 50 per cent zinc. In brief, it pointed out why we wanted to accept that type of material, low grade material and why we wanted to stockpile it, first, because we were processing as much as we could and secondly, because if we stockpiled a high grade material of zinc concentrate that contained a higher percentage of cadmium which was then in very short supply, it decreased our output of cadmium metal. Mr. Easton finally pointed out that we were withholding the approval of the plan set out by Mr. H. DeWitt Smith in a former letter and stating that the Sullivan Mining [18] Company wanted to cooperate fully and wanted the Metals Reserve to examine the situation and to send a representative to do so if they care to do that.

Mr. Brown: I offer Exhibit 5 in evidence at this time.

(Testimony of Wallace G. Wolf.)

The Court: Do you have any objection, Mr. Donahue?

Mr. Donahue: No objection.

The Court: It may be admitted.

Q. Until the time of this Plaintiff's Exhibit No. 5 had you had any question raised with respect to the grade of the concentrate going into the stock-pile?

A. None at all, in fact when that letter came to my attention I was somewhat surprised because previous to that time Mr. Haffner and myself and Mr. Fedderson, who is superintendent of the lead smelter of the Bunker Hill Company, had been called to a conference in Salt Lake City, Utah, along with other producers and smelters. This conference was under the direction of Howard Young, who at that time was an official of the War Production Board, he was president of the American Mining Congress and an outstanding mining man. We met in the Hotel Utah and the conference was divided into two groups, the lead producers group and the zinc producing group. I attended the zinc producing and processing group which was headed [19] up by Mr. Young himself. At that time we discussed the situation and the possible production of metal from our respective plants and we were urged to produce every pound of metal that we could because of the urgency of the war situation. So, having returned from that conference, in my way I did as much as I could, processed and received as much of this zinc concentrate, if we could

(Testimony of Wallace G. Wolf.)

handle and treat them, I felt that it was our duty.

Mr. Donahue: I believe that we are going out of line here in giving opinion evidence of the witness and also some considerable hearsay.

The Court: I presume that is true but this being a court matter and I am very desirous of getting all of the understandings that everybody had and I can assure you that I will eliminate that part which I do not consider relevant in making my decision. I won't hew too close to the technical rules the same as I would if we were trying this matter before a jury. I think with that understanding you may go ahead.

Q. Now, Mr. Wolf, will you go ahead with your answer?

A. I accepted these concentrates and we processed such tonnage of the low-grade concentrates as we could. It was only because the receipts of them were in excess of our ability to process that we had to stockpile; we [20] stockpiled some in the stockpile owned by the Sullivan Mining Company and later on we started to stockpile for the Metals Reserve and that brought up this letter about their dislike of stockpiling for their accounts this sub-grade material.

Q. On the basis of the quantity of these low-grade concentrates that were produced and sent to you, can you state what percentage you were processing against the percentage that was going into the Metals Reserve stockpile?

A. Without referring to any specific statistics I

(Testimony of Wallace G. Wolf.)

am unable to state definitely but I would say that we were processing 80 to 85 per cent of that low-grade concentrate that was sent to us and we didn't store over 15 per cent in the Metals Reserve stockpile.

Q. Did I understand, Mr. Wolf, that at the same time you were stockpiling for the government the Sullivan Mining Company was also stockpiling?

A. Yes, we maintained a stockpile for our own account, and as the exchange of letters modifying that agreement will show, we were supposed to maintain a stockpile of some 10,000 tons of concentrate for our own account, which we did.

Q. How were those concentrates handled upon receipt, that were stockpiled for your own account?

A. They were handled and received, stored in bins and handled just the same as the Metals Reserve except they were kept in separate bins and separate from the concentrates of the Metals Reserve but on the same ground and in close proximity to the Metal Reserve stockpile.

Q. Who unloaded those concentrates?

A. The Bunker Hill smelter crew.

Q. Was the same service used, the same crane service used in the stockpile of the Metals Reserve?

A. Yes, sir, as a matter of fact, there was no differentiation in the cost and all of the bills tendered to us all of the bills submitted by the Bunker Hill simply stated the entire cost, the tonnage of concentrates that had been unloaded and handled and the entire cost, and that was given to us in one

(Testimony of Wallace G. Wolf.)

account and we at the zinc plant had to segregate between the Metals Reserve and the Sullivan Mining Company but we didn't do that at the first, that is, at the beginning because we had every thought in mind that the concentrates were stored and would be processed by us so we didn't think there was any necessity of considering or handling the bills in any other manner, we simply paid the bills as given to us by the smelter.

Q. Did you subsequently allocate the cost on a tonnage [22] basis to the Metals Reserve and your own stockpile?

A. Yes, sir, that was much later on, we had to allocate the cost in proportion to the tonnage that had been unloaded and charged to the Metals Reserve and the tonnage of concentrates to the Sullivan Mining Company.

Q. At this point, Mr. Wolf, it might be well to explain, because it might come up from time to time, that is, reference to wet tons and dry tons of concentrate, will you briefly explain what the difference is?

A. The concentrates as received from the shippers contain a considerable percentage of moisture, the ore is milled by a wet milling process. The concentrates finally produced are put over a filter to remove the excess of water; that cannot be done in total so the concentrates vary in moisture from a minimum of 7 per cent to a maximum of 15 or 16 per cent. Some of the smaller shippers, because of inadequate facilities, ship us very wet concentrate.

(Testimony of Wallace G. Wolf.)

Dry tons means the actual tonnage of the concentrate with the moisture removed and wet tons refer to the concentrates plus the moisture content.

The Court: You didn't remove any of the moisture yourself before placing them in bins?

A. No, sir. [23]

Q. Do I understand then that it is the wet tons that actually came from the shipper and went into the stockpile? A. That is right.

Q. And as it remained there for sometime with the evaporation and so on that took place did you refer to it as dry tons?

A. No, when they were removed from the stockpile they also contained moisture, it might be lower than when it was originally put in the stockpile but it still had considerable moisture and was considered wet, however, settlement was on the dry ton basis, of course, you are not paying for the water content.

Q. It might be well to explain how you figure the dry ton weight?

A. A sample of the tonnage under consideration is generally weighed over the railroad scale and the tare weight or the weight of the concentrate less the weight of the ore car is given, then a sample is taken very carefully,—a moisture sample. That sample is put into a drier and the moisture is removed and from the wet weight and the dry weight the percentage of moisture is determined and settlement is made on the dry ton basis.

Q. Will you please take the instrument handed

(Testimony of Wallace G. Wolf.)

to you by the bailiff which has been marked Exhibit No. 6 for identification [24] purposes, I will ask you what that is, Mr. Wolf?

A. This is a letter addressed to the Sullivan Mining Company from H. DeWitt Smith, executive vice president of the Metals Reserve Company, and it refers to a modification of the original contract for stockpiling zinc concentrate.

Mr. Brown: I offer this in evidence.

The Court: Is there any objection?

Mr. Donahue: No objection.

The Court: It may be admitted.

Mr. Brown, I don't think that we have the date of that, what is that date, Mr. Clerk?

The Clerk: July 12, 1944.

Q. That is the date of Exhibit No. 6, Mr. Wolf?

A. Yes, sir.

The Court: We will recess at this time until 1:45.

November 2, 1953, 1:45 p.m.

Q. Mr. Wolf, just prior to the adjournment at lunchtime we had introduced in evidence the modification letter from Metals Reserve Company dated July 12, 1944, as Exhibit No. 6. That modification letter, Exhibit No. 6, has a provision in it differing from the original contract of [25] June 18, 1942, in that it provides that the Metals Reserve Company could remove from the stockpile, zinc concentrate for processing. I will ask you whether or not, prior to the letter of modification, July 12, 1944, you had any indication from the Metals Reserve Company

(Testimony of Wallace G. Wolf.)

that all or part of those concentrates might be removed for processing elsewhere?

A. No, we did not.

Q. You were aware at the time this modification was executed that there was a provision for allowing the removal of concentrates by the Metals Reserve Company?

A. In the modification, the modification provided for it?

Q. Yes, in the modification? A. Yes, sir.

Q. And there was not a similar provision in the original contract? A. No.

Q. The bailiff has handed you four letters, Mr. Wolf, they are marked Plaintiff's Exhibit 7 for identification, I will ask you what they are?

A. These are letters or rather it is an exchange of correspondence between H. DeWitt Smith, executive vice president of the Metals Reserve Company, and the Sullivan Mining Company regarding the matter of low-grade concentrate. Mr. Easton had had telephone [26] conversations with a Mr. Jesse Johnson of the Metals Reserve organization requesting a change in paragraph 4 of the Metals Reserve Company letter of agreement of July 12, 1944, which modified the original stockpile agreement. This first letter is a modification of that said paragraph 4. There follows a letter from Mr. L. E. Hanley who was the president of the Sullivan Mining Company at that time, discussing that modification and asking for a further change to be made. The subsequent letter is from H. DeWitt Smith

(Testimony of Wallace G. Wolf.)

dated August 1, 1944, and it agrees to the suggested changes, and the fourth letter is from Mr. Hanley inclosing copies of their letter with his confirmatory signature.

Q. Will you give the dates of those letters?

A. Yes, the first was under date July 12, no, that is July 20, 1944, and that is from H. DeWitt Smith to the Sullivan Mining Company, the second letter is dated July 24, 1944, addressed to the Metals Reserve Company from the Sullivan Mining Company signed by Mr. Hanley, the third letter is from H. DeWitt Smith, executive vice president of the Metals Reserve Company, addressed to the Sullivan Mining Company, and the fourth is a reply dated August 15, 1944.

Q. The effect of these letters actually is that the modification letter of July 12, 1944, before acceptance was, in one particular at any rate, amended by reason of these [27] letters?

A. Yes, sir, that's right.

Q. And the actual confirmation, the letter of confirmation is the last of the four letters, actual confirmation of the July 12, 1944, agreement?

A. Yes.

Q. And that is dated August 15, 1944?

A. Yes.

Mr. Brown: I offer Exhibit No. 7 in evidence.

The Court: Is there any objection?

Mr. Donahue: No objection.

The Court: It may be admitted.

Q. The bailiff has handed you two letters marked as Plaintiff's Exhibit No. 8 for identification pur-

(Testimony of Wallace G. Wolf.)

poses, I will ask you what that exhibit is, Mr. Wolf?

A. The first is a letter dated August 16, 1944, addressed to the Metals Reserve Company, attention Mr. H. DeWitt Smith, executive vice president, and it is from Mr. L. E. Hanley, president of the Sullivan Mining Company. It sets forth, in the last paragraph "We therefore ask that the provision of the contract limiting monthly zinc concentrate receipts which we may purchase as agent for Metals Reserve Company for its account to 2,000 tons per month be waived", and the earlier part of the letter explains the reason why, [28] shortage of man power, the large receipt of concentrates, and so on, and the reply under date of August 26, 1944, from H. DeWitt Smith, executive vice president of the Metals Reserve Company, has favorably considered the request and asks to return the inclosed confirmation copy. It says "This Company has favorably considered your request and you are hereby advised that until further notice the aforesaid limitation restricting the amount of material to be stockpiled for the account of this Company to 2,000 short tons in any one month is waived."

Q. Mr. Wolf, at that time and as a result of the modification letter and the extensions and the modifications allowed by the Metals Reserve Company which are in evidence, at the time of this correspondence, Plaintiff's Exhibit No. 8, the Sullivan Mining Company had been authorized to stockpile up to 40,000 tons with a maximum receipt per month of 2,000 tons. I notice that in this Ex-

(Testimony of Wallace G. Wolf.)

hibit 8 Mr. Hanley refers to an acute shortage of manpower and the fact that it had become necessary of this acute shortage to close down one unit of your plant, what is the fact as to whether or not that occurred?

A. The zinc plant at that time consisted of three electrolytic units. In the process the zinc is dissolved in a solution, that solution is electrolized in electrolytic cells and the zinc is obtained in an electrolytic deposit. [29] From the three such units at that time because of the shortage of manpower we had to curtail and shut down one unit which in effect cut our output about one third. The shortage was due to the fact that we could not get labor, during that period there was a lot of government work going on in various parts of the country hereabouts, ship building programs on the coast and took a lot of our labor out of the district and because our rates of pay were not as high as the government contract rates the result was that during that period we had great difficulty because of the shortage of manpower. At one period we employed or attempted to employ women which was something that we had never done before on regular operating jobs in the plant, of course, we had women in the office but had never tried them in actual operation. We made various attempts to get increased labor. We employed at one time, I don't recall the exact period, but we employed some internes Italians, they were internes at Missoula, Montana. Most of them were from Italian ships and were pris-

(Testimony of Wallace G. Wolf.)

oners of war at that time. They were permitted to come and we had a number of them come and work for us at one time. And at another time the government released a lot of coal miners to work in the mines to increase the ore taken out of these mines. A number of those coal miners not [30] acquainted with metal mining, and not liking it eventually gravitated to the zinc plant where we employed them. There were several such attempts to obtain labor and during that period there were several instances where we had to curtail to two units.

Q. You mentioned, Mr. Wolf, that there were a number of coal miners released by the government, where were they released from?

A. From the Army.

Mr. Brown: I offer in evidence now Plaintiff's Exhibit No. 8.

The Court: Do you have any objections to this exhibit?

Mr. Donahue: No objections.

The Court: It may be admitted.

Q. The bailiff has now handed you a series of letters marked as Plaintiff's Exhibit No. 9 for identification. I would like you to look at these and state what they are?

A. There are several letters here addressed by the officials of the Sullivan Mining Company to Metals Reserve Company asking for extension of time for stockpiling and increases in the tonnage for stockpiling for the Metals Reserve Company account, the first letter is dated December 5, 1944.

(Testimony of Wallace G. Wolf.)

The reply to that is under date of December 16 by Jesse C. Johnson, chief engineer for the Metals [31] Reserve Company, saying that our request had been referred to the War Production Board for consideration and that they would advise us as soon as decision had been reached.

Mr. Donahue: May I have the date of that letter?

A. Yes, that was December 16, 1944, and that was a letter from Jesse C. Johnson. There is a telegram dated December 30, 1944, from Harvey J. Gunderson, executive vice president of the Metals Reserve Company, and it says "Pursuant War Production Board recommendation MRAA-29 is hereby amended by increasing aggregate amount of material which you are authorized to purchase for our account from 40,000 short tons to 55,000 short tons and by expending effective period of agreement from December 31, 1944, to June 30, 1945, subject to existing cancellation rights. All other terms remain unchanged, please confirm by letter that these amendments are satisfactory."

Q. The whole series of letters, Mr. Wolf, deal with extension of the stockpiling agreement of June 19, 1942, as amended by letter of July 12, 1944, and deal with the extension of time for stockpiling and increase in tonnage?

A. That is right. [32]

Q. The last letter is dated August 2, 1946, I believe?

(Testimony of Wallace G. Wolf.)

A. August 1, there is a letter of August 1, '46, —no,—the last is dated August 2, yes.

Q. And the ultimate effect of this series of letters was to extend the contract to December 31, 1946, and providing finally for the increase of stockpiling up to 80,000 tons? A. Yes.

Mr. Brown: We offer in evidence these instruments now as Exhibit No. 9, Plaintiff's Exhibit No. 9.

The Court: Do you have any objection?

Mr. Donahue: No objection, your Honor.

The Court: It may be admitted.

Mr. Brown: I see that I have a few more letters extending the contract to 1947.

The Court: Show them to counsel.

Mr. Donahue: Could these be attached to Exhibit 9?

The Court: Attach them and then, Mr. Bailiff, show them to counsel.

Mr. Donahue: No objection, your Honor.

The Court: They may be admitted as attached to Exhibit 9.

Q. Mr. Wolf, during all of the time that I have questioned [33] you about up until 1945, with whom had you been dealing with respect to the stockpiling?

A. With the Metals Reserve Company.

Q. As a part of Exhibit No. 9 there is a telegram addressed to you from Harvey J. Gunderson, executive director office of Metals Reserve, Reconstruction Finance Corporation, and in that tele-

(Testimony of Wallace G. Wolf.)

gram you are advised as follows: "Subject to existing cancellations rights and by substituting",—at any rate, you were instructed to substitute Reconstruction Finance Corporation for the Metals Reserve Company. Now, in the future, from that time forward were you dealing with the Reconstruction Finance Corporation? A. Yes, sir.

Q. Plaintiff's Exhibit No. 9 shows that your authority for stockpiling for the account of Reconstruction Finance Corporation was extended to June 30, 1947, and that you were limited to finally stockpiling for their account, 80,000 tons of zinc concentrate. Did you stockpile for them up until the expiration of that period?

A. Yes, sir.

Q. What was the total tonnage, Mr. Wolf, if you know, of the concentrates that were actually stockpiled in the name of the Metals Reserve Company and the Reconstruction Finance Corporation?

A. There was something like 72,000 tons, total.

Q. Did you consider that in terms of wet tons or dry tons?

A. I think that was wet tons, probably.

Q. Would that be on the basis of tons as they were received?

A. Yes, I think on the basis of dry tons, it was something like 65,000 tons.

Q. Were they unloaded on a wet tonnage basis?

A. Yes, all of them.

Q. Did they go into the stockpile as wet tons?

A. Yes.

(Testimony of Wallace G. Wolf.)

Q. Mr. Wolf, as part of Plaintiff's Exhibit No. 9 there is a letter addressed to the Sullivan Mining Company from the Reconstruction Finance Corporation under date of August 13, 1946, in which request is made, or inquiry is made as to whether or not you could, at that time, start to process some of these stockpiled concentrates. Had you had any previous request from the Corporation to process any of these concentrates?

A. From the Reconstruction Finance Corporation?

Q. Yes. A. No.

Mr. Donahue: May I ask what exhibit that letter is contained in?

Mr. Brown: No. 9.

Mr. Donahue: And is that letter dated August 13? [35]

Mr. Brown: Yes, it is.

Q. Now, on June 30, 1947, your stockpiling agreement terminated. Did the stockpile of zinc concentrate then remain at your plant,—not at your plant, but as they were stockpiled, did they remain in stockpile?

A. No, they were shipped elsewhere.

Q. When, if you could tell me approximately, were the first of those concentrates removed and shipped elsewhere?

A. There was a tonnage of something like 17,500 tons that were removed to the zinc plant of the Anaconda Copper Mining Company, that was in 1946, I believe, or 1947, I am not sure.

(Testimony of Wallace G. Wolf.)

Q. At whose direction were those shipped out?

A. I am uncertain of the date that was shipped out, I cannot recall——

Q. ——Do you recall what agency directed you to ship them out? A. The Metals Reserve.

Q. Who supervised the loading out of the concentrates?

A. The zinc plant personnel supervised it.

Q. By the zinc plant personnel do you mean the personnel of the Sullivan Mining Company?

A. Well, we watched the tonnages and told the Bunker Hill Smelter people what bins to remove it from, we kept [36] the record of the tonnage shipped to the Anaconda Copper Mining Company.

Q. Whose facilities were used there?

A. The Bunker Hill smelter facilities.

Q. Were those the same facilities as were used in unloading the concentrates and putting them into the stockpile? A. Yes.

Q. Now, Mr. Wolf, referring to Exhibit No. 10, will you state very briefly what they are?

A. This is a letter to Morris Levinson, executive director, office of Metals Reserve, Reconstruction Finance Corporation, regarding the zinc contract, this letter is from me as superintendent, telling him how much of the concentrates we were authorized to purchase or that had been authorized to be purchased, 80,000 tons, and that we had purchased 65,100 tons and that we had not purchased any for the Reconstruction Finance Corporation account since November of 1946 and asking if their

(Testimony of Wallace G. Wolf.)

office will continue to stockpile zinc concentrate for its account. There is a reply acknowledging receipt of this letter and advising that no provision had been made for continuing this program after June 30, 1947.

Mr. Brown: We offer this evidence at this time.

Mr. Donahue: We have no objection. [37]

The Court: It may be admitted.

Q. The bailiff has handed you some letters marked for identification as Plaintiff's Exhibit No. 11, I will ask you to state what that exhibit is?

A. The first is a letter under date of February 19, 1948, from George S. Jewett, associate director, office of Metals Reserve. The letter states that the Munitions Board has requested that the zinc metal and the permanent stockpile be made available to them as soon as treatment contracts can be arranged; notifying us that capacity for treatment of those concentrates is available at other smelters and asking if our facilities are not available for treating these, to advise if we were in a position to load the concentrates and the number of cars we could conveniently load per week.

Mr. Donahue: And the date of that letter, please, Mr. Wolf?

A. February 19, 1948. The second is a telegram under date of March 3, 1948, referring to this letter and it says, "Please let us have your reply by wire as to tonnage you can load weekly as we are being pressed by all concerned." That telegram is from George S. Jewett, associate director of the Metals

(Testimony of Wallace G. Wolf.)

Reserve. The third is a reply to him from me under date of March 4, 1948, stating, "Concentrate moving equipment, crews for [38] same, present supply railroad gondola cars now occupied. Study now being made possible availability men, necessary loading equipment and required additional railroad cars. Will advise fully soon as information is available." The final one is a letter under date of March 11, 1948, from me to Mr. Jewett, explaining the situation as to our ability to load out the concentrates, the availability of equipment as the smelter for doing that work, speaking of the shortage of labor and the serious freight car shortage in the district and stating that it would be necessary to have their assistance in obtaining additional freight cars desirable for concentrate shipments. In the last paragraph I state: "When the subject agreement was entered into it was contemplated that the stockpiled concentrates would eventually be processed in our plant which would derive the benefits accruing therefrom, including the processing margin. Since the stockpile concentrates are not to be shipped elsewhere we contend that we should be reimbursed for these substantial out-of-pocket expense of this stockpiling and we trust that you will take appropriate action that we may receive equitable consideration under the circumstances."

Mr. Brown: I now offer Exhibit No. 11 in evidence, if your Honor please.

The Court: Do you have any objection? [39]

Mr. Donahue: No objection.

(Testimony of Wallace G. Wolf.)

The Court: It may be admitted.

Q. Did you receive a reply as to your inquiry or request with the respect to the payment of this out-of-pocket funds? A. I think we did.

Q. The bailiff has now handed you exhibit marked as Plaintiff's Exhibit No. 12 for identification, and I will ask you what that is?

A. This is a letter under date of April 26, 1948, from George S. Jewett, associate director, office of Metals Reserve, in which he acknowledges my letter of March 11, 1948, and in which he advises me,— he says: "We are pleased to acknowledge your letter of March 11, 1948, in which you advise that you believe it would be possible to load with your present crane crews three cars per day from the stockpile," and so forth, and he says that the material should be moved in open top gondola type cars and that it is contemplated that the movement will commence shortly. And it says they will give us as much advance notice as possible, then it goes on to say: "With regard to the last paragraph of your letter of March 11, 1948, you will recall that this stockpiling program was entered into in connection with absorbing increased production brought forth under [40] the premium price plan, and that stockpiles of this nature were established at various consuming smelters throughout the United States in order to make available to such smelters substantial inventories at no cost other than what might be incurred in receiving and stockpiling the material." Then it goes on: "By amendment it was provided

(Testimony of Wallace G. Wolf.)

that smelters where such stockpiles existed would be reimbursed for actual out-of-pocket cost incurred in connection with removing tonnage from stockpiles, or any purpose other than sales to the smelter at which the stockpiles are located." Then in the next paragraph it states: "In view of this we do not believe we should be called upon to pay any expense for establishing the stockpiles or for unloading materials into the stockpile." And then in the next paragraph: "In connection with the cost incurred from time to time for maintenance of these stockpiles we ask that you kindly prepare a schedule showing the dates on which repairs to the stockpiles were made, giving a slight description of the work performed and actual costs incurred by you for such work. Upon receipt of this schedule we will be pleased to give this matter further consideration."

Mr. Brown: We offer this exhibit in evidence, it is Plaintiff's Exhibit No. 12. [41]

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Mr. Wolf, the bailiff has handed you certain instruments as Plaintiff's Exhibit No. 13 for identification and I will ask you what those are?

A. This is a letter under date of May 4, 1948, addressed to the Sullivan Mining Company, attention W. G. Wolf, authorizing the release and shipment at the rate of three cars per day of 17,322 standard dry tons of star zinc concentrates to the Anaconda Mining Company, giving general instruc-

(Testimony of Wallace G. Wolf.)

tions as to weighing and sampling, handling of documents and so on in connection with it. The next letter is dated May 10, 1948, addressed to George S. Jewett, associate director, office of Metals Reserve, and it is signed by me as superintendent, referring to his letter of April 26, and to the letter of instructions of May 4th. In that letter I pointed out in previous correspondence where I had stated "we" and "our", I corrected it and explained at that time that it was stockpiled on Bunker Hill smelter ground and that all the work had to be done by Bunker Hill smelter crews in connection with the loading out,—with their crews and equipment. They had, in their instructions told us that all the cars had to be track scaled at [42] the Silver King and, of course, Silver King is the site of the zinc plant and the Bunker Hill smelter is at the bottom of the gulch about a mile away and their station is Bradley and that had to be corrected. I explained just how the procedure had to be done, the cars had to be loaded from stockpile and passed over the Bunker Hill smelter scales; stating at that time that the smelter had informed us that there would be a cost of 10 dollars per car to cover that expense and that it would be in addition to the 40 cents per ton under the present labor costs and conditions for the Bunker Hill to load the material,—stating that the modification of the procedure as authorized by him be made accordingly. Going on to say that we would make every effort to load and ship according to schedule but going on to point

(Testimony of Wallace G. Wolf.)

out the shortage of labor and equipment that the Bunker Hill smelter had, then on the last page of my letter I referred to his letter of April 26, and I quoted from his letter: "With regard to the last paragraph of your letter of March 11, 1948, you will recall that this stockpiling program was entered into in connection with absorbing increased production brought forth under the premium price plan, and that stockpiles of this nature were established at various consuming smelters throughout the United States in order to make [43] available to such smelters substantial inventories at no cost other than what might be incurred in receiving and stockpiling the material." And I am still quoting in my letter from his letter of April 26: "By amendment, it was provided that the smelters where such stockpiles existed could be reimbursed for actual out-of-pocket costs incurred in connection with removing tonnage from stockpile, for any purpose other than sale to the smelter at which the stockpile was located." Still quoting from his letter: "In view of this we do not believe we should be called upon to pay any expense for establishing stockpiles or for unloading materials into the stockpiles." Then my letter continues as follows: "This company entered into the stockpile agreement AA-29 as a war time action because of consideration of national security and with every supposition and belief that the stockpiled zinc concentrate would be processed eventually at this plant. This is stressed and emphasized in the first para-

(Testimony of Wallace G. Wolf.)

graph of your letter quoted above. We consider, therefore, now that these concentrates are to be shipped elsewhere, that your decision above quoted is inexcusably arbitrary and high-handed and a gratuitous imposition on the company's cooperation that prevailed during the time of national crisis, and we believe that the Reconstruction Finance Corporation, [44] as a responsible government agency, cannot hold itself aloof from that aspect of the matter but should reimburse this company for expense incurred in stockpiling. We believe that the matter deserves a more realistic attitude, one that is fair and equitable, and we hope that your decision may be reconsidered accordingly." That letter was signed by me as superintendent.

Mr. Brown: I offer Exhibit No. 13 in evidence.

The Court: Is there any objection?

Mr. Donahue: No objection.

The Court: Then it may be admitted.

Q. The bailiff has handed you exhibit marked as Plaintiff's Exhibit No. 14 for identification, and I will ask you, Mr. Wolf, what that is?

A. This is a letter under date July 1, 1948, from the Reconstruction Finance Corporation office of Metals Reserve, signed W. F. McKinnon, deputy director, office of Metals Reserve. It refers to the last paragraph of,—this letter is addressed to me as superintendent and it refers to the last paragraph of a letter from us of May 10, 1948, requesting further consideration to be given to reimbursing the company for expenses incurred for stock-

(Testimony of Wallace G. Wolf.)

piling material accumulated under the present [45] agreement. It points out in the second paragraph as follows: "On August 13, 1946, we wrote to you asking if you were in a position to treat these concentrates for our accounts and the tonnage you would be in a position to handle each month. On August 20, 1946, you replied that because of a shortage of labor, and also as you had approximately 10,700 tons of material in your own stockpile, you would be unable to handle any of our material at that time, but that you might be able to consider purchasing some of the material in the fall. On September 16, 1946, we advised that under present regulations we could sell only on CPA recommendations to meet deficiencies and again stated that we would like for you to treat the concentrates on a toll basis under which we would pay treatment charges and receive the resulting zinc metal.

"As conditions over which we have no control changed we had no alternative but to declare the stockpile of zinc concentrate to the Munitions Board for inclusion in the permanent stockpile and on February 19, 1948, we wrote to you asking if you could treat all or a part of the stockpile and requested a prompt reply as we were being pressed to place the zinc metal in permanent stockpile, and advising that there was smelter [46] capacities available elsewhere. Not having received a reply, we wired you on March 3, 1948, and then received your letter of March 11, 1948, advising that your plant capacity was being utilized fully for treat-

(Testimony of Wallace G. Wolf.)

ment of zinc concentrate being tendered to you in the usual manner, and in this letter you raised the question of reimbursement to you for expenses incurred in receiving and stockpiling the material.

“From the above we believe that it is clear you were given ample opportunity to arrange for processing of the material at your plant. As we advised in our letter of April 26, 1948, stockpiles of this nature were established at various consuming smelters throughout the United States and we have not been requested to reimburse any of these smelters for expenses incurred in receiving and stockpiling such materials.

“From time to time smelters where these stockpiles were established have recommended certain repairs to the stockpiles in order to preserve the material and we have given every consideration to these requests for maintenance costs.

“As we advised you in our letter of April 26, 1948, we would be pleased to give consideration to any similar expenses you have incurred in connection with these stockpiles if you would kindly furnish us a [47] schedule giving a slight description of the work performed and the actual cost incurred by you in making such repairs.

“We are very pleased to know that the material is now being loaded and shipped out of your plant. The zinc metal resulting from the treatment of this material is, as we stated before, going to a permanent stockpile in accordance with instructions issued by the Munitions Board.”

(Testimony of Wallace G. Wolf.)

Mr. Brown: We offer Plaintiff's Exhibit No. 14 in evidence.

Mr. Donahue: No objection, your Honor.

The Court: It may be admitted. We will take a recess for fifteen minutes at this time.

November 2, 1953, 3:10 o'clock, p.m.

Q. Mr. Wolf, the bailiff has handed you what has been marked for identification as Plaintiff's Exhibit No. 15, I will ask you what that is?

A. This is a letter under date of July 9, 1948, signed by T. J. Doherty, assistant traffic manager, office Metals Reserve, and it is addressed to me as superintendent of the Sullivan Mining Company Zinc Plant. It discusses the switching charge of \$10.00 per car and concerns the [48] weighing on track scales and shipments and so on. There is my reply, that is under date of July, 1948, July 28, 1948, mentioning that the letter had been delayed because I had to get authorization and advice from the Bunker Hill smelter concerning these specific subject matters explaining the charge and in conclusion I said: "I feel, considering the amount of work involved and the inconvenience to our own operation, that \$10.00 per car for engine service is a very reasonable charge and we shall continue to make the charge." That was in accordance with a memo from Mr. Federson to me, substantiating that charge of \$10.00 per car for switching.

Mr. Brown: We offer Exhibit No. 15 in evidence.

Mr. Donahue: We have no objection.

(Testimony of Wallace G. Wolf.)

The Court: It may be admitted.

Q. Referring specifically to Exhibits No. 13 and 15 which relate primarily to shipping instructions from the Reconstruction Finance Corporation with respect to the methods of shipment of concentrates to the Anaconda Copper Mining Company, did you ship the concentrates in accordance with those instructions?

A. We did. I stated in my previous testimony that the shipment was made to Anaconda in 1946, in reality it [49] was made in 1948.

Q. Was that through the approximate periods of these shipping instructions or shortly thereafter?

A. Yes.

Q. Is that the 17,500 tons, or approximately, that that you referred to before, that was shipped out?

A. Yes, sir.

Q. That was all shipped in 1948?

A. Yes, sir.

Q. At or about that time, or shortly thereafter, in 1948 were any other concentrates shipped out to the Anaconda Copper Mining Company?

A. After the termination, after we could no longer store for the Metals Reserve account there was a large tonnage of zinc concentrates offered to us in excess of our capacity to treat and by arrangement with the shippers we received as much from them as we possibly could and the balance we put in a stockpile, which we called the shippers' stockpile, and we made arrangement to ship that stockpile to the Anaconda under contract. We paid the

(Testimony of Wallace G. Wolf.)

shippers to us, the same amount as we received from the Anaconda except that we absorbed the freight from Bradley, the site of the stockpile to the Anaconda Company, something like \$6.00 per ton. We paid that. [50]

Q. Was the amount of shipment that you were then receiving from the shippers in excess of your own smelting capacity and in excess of the amount that go into the government stockpile monthly?

A. Yes, as I recall we shipped in excess of 11,000 tons to the Anaconda Company. That was in addition to and had nothing to do with the 17,500 tons that we shipped from the Metals Reserve stockpile.

Q. The 11,000 tons was not concentrates of the Reconstruction Finance Corporation?

A. No.

Q. Were they concentrates you yourself, that is, your company had purchased?

A. We purchased them by agreement with the Producers, with the understanding that we would be able to dispose of them to the Anaconda Company and we did dispose of them to the Anaconda Company. The object was to maintain the mines in production.

Q. You were not stockpiling any concentrates for the Reconstruction Finance Corporation at that time?

A. No, sir.

Q. Were you stockpiling any after June 30, 1948?

(Testimony of Wallace G. Wolf.)

A. That was the termination of the stockpiling for the government. [51]

The Court: Did you mean June, 1947, or 1948?

Mr. Brown: June 30, 1947.

Q. So that the additional eleven thousand and some odd tons that you shipped on your own account out of your own stockpile in 1948, I asked, those were your own concentrates, is that correct?

A. Not out of our own stockpile, it was stockpile that accumulated for the shippers account. They were producing and we stockpiled them because they didn't have any facilities to stockpile on their own premises. It was stockpiled with the understanding that we would be able to ship the concentrates to Anaconda. I made arrangement with the Anaconda to ship the concentrates and we did ship them under contract with the Anaconda and the shippers were paid on the basis of the schedule of payment from the Anaconda with the exception that we absorbed the freight from the shippers stockpile to the Anaconda, that is from the Bunker Hill smelter to the Anaconda Company. The freight was something in excess of \$6.00 per ton. Sullivan Mining Company absorbed that.

Q. Mr. Wolf, I refer now to Plaintiff's Exhibit No. 14 that you examined a few minutes ago and was admitted in evidence, it is dated July 1, 1948. That is, where [52] the Reconstruction Finance Corporation in its letter to you advised that at some smelters they had given consideration to the cost of maintaining the stockpiles at smelters and

(Testimony of Wallace G. Wolf.)

in the letter advised you that they would give consideration to the cost that you might have had with respect to maintaining such stockpiles and would be pleased to consider that for you. As a result of that I will ask you if you prepared such a statement? A. I did.

Q. Now, Mr. Wolf, the bailiff has handed you an exhibit marked as Plaintiff's Exhibit No. 16, I will ask you to state what that is?

A. That is a letter under date of July 15, 1948, to the Reconstruction Finance Corporation, written by me, referring to their letter of July 1, 1948, in which they stated what you have, in substance, just stated in your question, about making repairs and maintenance of the stockpiles, and so forth, and telling them: "In accordance with the foregoing we have prepared such a schedule which is submitted herewith with the following explanation" and then I went on explaining just how the stockpiling was done and how the cost of building up the stockpiles was incurred and stating that this stockpiling had been done by the Bunker Hill smelter and [53] some of that stockpiling had been done for concentrates that had been placed in the Sullivan Mining Company stockpile and some of them in the government stockpile and that the smelter's cost, didn't in their statement to us, that they simply gave us the over-all cost for the entire works and that we were compelled to allocate it in accordance with the respective tonnage stored by the Bunker Hill smelter and the Sullivan Mining Company and

(Testimony of Wallace G. Wolf.)

for the account of Metals Reserve and pointing out that these costs were apportioned accordingly as shown on the statement.

Q. And attached is there a part of that exhibit, a response to the letter or the statement?

A. Yes, a letter under date of July 30, 1948, addressed to the Sullivan Mining Company, attention W. G. Wolf, superintendent, from the Reconstruction Finance Corporation, and signed W. F. McKinnon, deputy director office of Metals Reserve. It says: "Reference is had to your letter of July 15, 1948, submitting a schedule of costs totaling \$37,273.07 incurred by you in connection with stockpiling zinc concentrate. Of this amount you have allocated to the materials stockpiled under the subject agreement the total of \$27,310.29." Then they go on and state that they had reviewed the schedule submitted but they could not agree to reimburse us, and going on [54] to state that Mr. Leo J. Coady is their field representative and that he would be in the vicinity of Kellogg within the next few weeks, and also stating that he was familiar with the stockpiles as established with the other smelters and that he would call on us in connection with the matter.

Mr. Brown: I now offer in evidence Plaintiff's Exhibit No. 16.

Mr. Donahue: No objection.

The Court: It may be admitted.

Q. Mr. Wolf, I will ask you to refer to Plaintiff's Exhibit No. 16 which has now been admitted,

(Testimony of Wallace G. Wolf.)

will you state what was the total cost figure shown there for the maintenance of all concentrates stock-piled at that time?

A. This statement shows \$32,773.07.

Q. How much of that was allocated to the Reconstruction Finance Corporation?

A. \$27,310.20. On this basis, there was stored for Metals Reserve 65,501 tons and for the Sullivan Miling Company 13,101.9 tons, for a total of 78,603, and allocating on the basis of cost the tons totaled in amounts for the Metals Reserve \$27,310.29, for Sullivan \$5,462.78, making a total of \$32,773.07.

Q. Have you taken an arbitrary cost per ton for this? [55]

A. No, it was based on our invoices that we received and paid to the Bunker Hill smelter for their costs. We had paid those amounts over the various periods of time.

Q. And did that include the cost of lumber?

A. It included smelter costs, lumber cost, in fact, the total cost.

Q. Let me ask you, did that statement include the cost paid by your company to the Bunker Hill for the use of its locomotive and crane in the unloading of concentrates?

A. No, I don't think so, I think in this segregation the smelter cost simply was the cost of lumber for building bins.

Q. And you show Bunker Hill smelter cost,—you mean by that, that related only to the lumber cost on the bins?

A. Yes.

(Testimony of Wallace G. Wolf.)

Q. And you did not show here the crane cost for the actual unloading cost to you?

A. That is my understanding.

Q. Now, on the tonnage basis you refer to 65,501.26 tons, were you referring to wet tons or dry tons? A. I think that was wet tons.

Q. You understand, Mr. Wolf, in making this statement you were referring only to the maintenance cost?

A. The fact is that we stored for Metals Reserve 65,501 tons [56] as dry tons, the total that we stored for the Metals Reserve was 72,000 tons.

Q. So that this statement was based on dry tons?

A. That is right, dry tons.

The Court: Was it 72,000 even or was it 72,603 tons?

A. There was an odd figure, I don't recall the odd figure.

Q. Referring to Plaintiff's Exhibit No. 16, Mr. Wolf, the second letter attached as a part thereof is in answer to your letter and statement, and is from the Reconstruction Finance Corporation, and there is a reference in it to the fact that Mr. Leo J. Coady will call upon you in connection with this, did he visit your plant?

A. Yes, sir, shortly thereafter Mr. Coady came to Kellogg. As I recall, he came to the office of Mr. Haffner and Mr. Haffner, I and Mr. Federson, superintendent of the Bunker Hill smelter, discussed with Mr. Coady, in Mr. Haffner's office,—Mr. Haffner told Mr. Coady—

(Testimony of Wallace G. Wolf.)

Q. —What was said back and forth, just relate in a general way what he did, Mr. Wolf?

A. There was a discussion in the office and following that Mr. Federson and I took Mr. Coady over the ground there, where the concentrates were stockpiled and we showed him the railroad trackage, the method of loading [57] and unloading into the stockpiles. He looked over the stockpiles in various parts of the smelter grounds. That was late in the evening and Mr. Coady came out to the zinc plant office the next day and went into our records. We showed him how we had kept the records for the premium price payments,—how that had been paid, and he looked into our books and went over the whole record regarding those stockpiles and the matter of stockpiling. He then said that he wanted to see some of the cars unloaded or loaded from the stockpile, we had not been able to see that the previous night because he had gone down there late after the workmen had quit. We arranged for him to go down, we didn't go with him, as I recall, but Mr. Coady went down and saw that and then he left the district.

Q. Did you spend all of the time that he wished you to with him for the period of two days?

A. Oh, yes, he was satisfied, he had gotten all of the information that he wanted.

Q. The bailiff has handed to you letters marked as Plaintiff's Exhibit No. 17 for identification, I will ask you what they are, Mr. Wolf?

A. This is a letter under date October 22, 1948.

(Testimony of Wallace G. Wolf.)

It is addressed to the Sullivan Mining Company from Reconstruction Finance Corporation, office of War Activity [58] Liquidation, and it is signed T. J. Doherty, chief stockpile branch, informing that all of the concentrates in the Silver King stockpile has been accepted by the Munitions Board for the permanent stockpile. And it says: "As you know, we have been shipping concentrates from this stockpile to the Anaconda Copper Mining Company for treatment and delivering the resultant metal to Treasury Department, Bureau of Federal Supply, for stockpile under instructions of the Treasury Department, Bureau of Federal Supply. It has now been agreed that we shall transfer physical custody of the entire government stockpiles of zinc concentrates stored at Silver King to Treasury Department, Bureau of Federal Supply, effective at the end of business October 31, 1948.

"In this connection it is proposed that our contract dated June 18, 1942, as amended, be taken over by Treasury Department, Bureau of Federal Supply, at the close of business, October 31, 1948. We will furnish you a preliminary release to Treasury Department, Bureau of Federal Supply, for all material remaining in stockpile at the end of business, October 31, 1948, and will cancel our shipping instructions effective on that date. It is anticipated that Treasury Department, Bureau of Federal Supply, will request new storage documents, covering the material remaining in stockpile [59] and, upon receipt of such documents by Treasury

(Testimony of Wallace G. Wolf.)

Department, Bureau of Federal Supply, your storage certificate now held by Reconstruction Finance Corporation will be returned to you.

“From November 1, 1948, you would look to Treasury Department, Bureau of Federal Supply, for shipping instructions and for payment of all invoices covering the services rendered to it.

“If you will agree with this proposed procedure, please advise and the pertinent details can be arranged to our mutual satisfaction.” That is signed, as I said, by Mr. T. J. Doherty.

Attached thereto is a letter under date October 27, 1948, addressed to the Office of War Activity Liquidation, Reconstruction Finance Corporation, Washington, D. C., attention Mr. T. J. Doherty, and we state that the procedure set forth in their letter is satisfactory, and then in the last paragraph we state: “In this connection we wish to state that we still maintain our position concerning proper reimbursement for our costs incident to the stock-piling of these concentrates.” And the letter is signed by me as superintendent.

Mr. Brown: We offer Exhibit No. 17 in evidence. [60]

Mr. Donahue: We have no objection to that.

The Court: It may be admitted.

Q. The bailiff has handed you two documents marked as Plaintiff's Exhibit No. 18 for identification, and I will ask you what those are?

A. The first is a letter under date November 1, 1948, addressed to the Sullivan Mining Company,

(Testimony of Wallace G. Wolf.)

Kellogg, Idaho, and for my attention, it is from the Reconstruction Finance Corporation, Office of War Activity Liquidation, and this letter says in reference to our letter of October 22, 1948, and the reply of October 27 that it was impossible,—they advised us that it was impossible to complete the transfer of the zinc concentrate stockpiles effective October 31, 1948, and advising us that we would proceed under the outstanding instructions until further advised. And in the last paragraph it says: “The tentative date for the transfer has now been set forward to the end of business November 30, 1948, and you will hear from us further if the transfer can be accomplished by that date.”

The second letter is under date November 9, 1948, from the Reconstruction Finance Corporation, Office of War Activity Liquidation, and it is addressed to the Sullivan Mining Company, announcing that all of the [61] concentrates which you are holding at Silver King, Idaho, for the account of this corporation have been declared to and accepted by the Munitions Board for the permanent stockpile. As you know, the material accepted for the permanent stockpile is placed under the custody of the Treasury Department, Bureau of Federal Supply,—and then in the next paragraph it says: “Accordingly you are requested to accept this letter as a release of all material remaining in stockpile to Treasury Department, Bureau of Federal Supply, effective as of the close of business November 30, 1948. In accordance with the above, all charges in-

(Testimony of Wallace G. Wolf.)

curred in connection with this material will be for the account of and you will bill such charges to Bureau of Federal Supply, effective as of December 1, 1948. Our legal division is arranging to sign the underlying contract involved in this storage operation." Telling us where the correspondence is to be addressed, and it states further: "You are requested to advise Mr. Johnson of the quantity of material that remains in the stockpile as of the close of business November 30, 1948." Then in the following paragraph they state: "It is our understanding that the Treasury Department, Bureau of Federal Supply, will request you to issue new storage documents in their name for the quantity [62] of material that remains in the stockpiles at the close of business November 30, 1948. But in the meantime, the original storage documents issued by you covering the material will be held by this corporation for the account of Bureau of Federal Supply."

Then it goes on in the following paragraph: "Our shipping instructions dated May 4, 1948, shipping release No. 5081, covering 17,322 short dry tons of this material are cancelled hereby, effective as of the close of business November 30, 1948, and it is our understanding that the Bureau of Federal Supply will reissue shipping instructions covering the material as they desire. We ask that you indicate your understanding and acceptance of the above by signing and returning the attached copy of this letter."

Mr. Brown: We offer this exhibit in evidence.

(Testimony of Wallace G. Wolf.)

Mr. Donahue: No objection.

The Court: It may be admitted, the fact is that the statement was that the custody of the stockpile would be transferred to the Federal Bureau of Supply on October 31, 1948, the actual custody,—the physical custody was not taken over until November 30, 1948, is that correct?

A. That is right. [63]

Q. That was a result of Exhibit No. 18?

A. Yes, sir.

Q. And in the meantime, you had been shipping concentrates at the direction of the Reconstruction Finance Corporation?

A. Yes, sir, approximately 17,500 tons to the Anaconda Copper Mining Company.

Q. The bailiff has handed you Plaintiff's Exhibit No. 19 marked for identification, and I will ask you what that is?

A. That is a letter from the Reconstruction Finance Corporation, Office of War Activity Liquidation, under date of November 18, 1948, and it is addressed to the Sullivan Mining Company concerning shipping release No. 5580 pointing out in the second paragraph: "Our records indicate that this shipment has not been completed and we have a letter from the Anaconda Copper Mining Company advising that they received less than 1,100 tons of concentrates during the month of October against our instructions to ship 3,000 tons per month. We request that you make every effort to ship at least 3,000 tons during the month of Novem-

(Testimony of Wallace G. Wolf.)

ber and, in order that there will be no stoppage in the shipment, you are authorized to ship up to 3,000 tons against shipping release 5580, during the month of November and under the [64] same general instructions as outlined in our letter of May 4, 1948. Your cooperation in maintaining the shipping schedule during the month of November will be very much appreciated. You will, of course, observe our instructions in our letter of November 9, 1948, as to the cancellation of these instructions at the close of business November 30, 1948." The second letter is dated November 22, 1948, and is my reply to the letter from which I have just quoted, and it is addressed to the Reconstruction Finance Corporation, Office of War Activity Liquidation, Washington, D. C., pointing out the reasons why the shipment, during the month of October, had not been made,—it was attributable to a periodic hard lead run by the Bunker Hill smelter, the equipment of which was engaged in that activity and could not load out the concentrates or as much of it, and in the next paragraph which is the third paragraph of this letter it is stated: "As of today, 12 cars of your concentrates have been shipped in November. As closely as we can estimate on a as-loaded or wet tonnage basis eleven additional cars will result in approximately a total shipment of 17,322 short dry tons authorized by your shipping release No. 5580. Mr. Fedderson, Bunker Hill smelter general superintendent, advises me that he will try to ship these remaining eleven cars [65] before November 30."

(Testimony of Wallace G. Wolf.)

Mr. Brown: We offer in evidence Exhibit No. 19 at this time.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. By Exhibits No. 17 and 18 you were notified that the Reconstruction Finance Corporation was delivering the physical custody of this stockpile to the Federal Bureau of Supply. Did you subsequently hear from the Federal Bureau of Supply?

A. Yes.

Q. Handing you a series of telegrams which have been marked Plaintiff's Exhibit No. 20 for identification, I will ask you what they are?

A. This is a series of telegrams; the first is dated November 18, 1948, from J. E. Salisbury, chief storage and transportation division, Bureau of Federal Supply, Washington, and it is as follows: "Relet to you from RFC dated November 9, 1948, concerning transfer of physical custody zinc concentrate now held by you at Silver King, Idaho. It is understood that you are agreeable to service above material for account Bureau of Federal Supply on same basis as in effect with RFC. Please confirm immediately so that appropriate service agreement may be forwarded to you for execution." [66] On November 19, 1948, a telegram to Mr. Salisbury as follows: "Reurtel 18th. We are agreeable to service stated concentrates for account Bureau of Federal Supply on same basis as in effect with RFC." The next is a telegram dated January 10, 1949, addressed to the Sullivan Mining Company,

(Testimony of Wallace G. Wolf.)

Kellogg, Idaho, from H. C. Maull, Jr., Bureau of Federal Supply, Washington, D.C., and is as follows: "Reurtel November 19, 1948. Storage and servicing zinc concentrates at Silver King, Idaho, account of Bureau of Federal Supply same basis as in effect Reconstruction Finance Corporation. Offer accepted. Contract S.C.M.-TC-12755 follows." The next is a telegram dated January 13, 1949, addressed to the Sullivan Mining Company: "Reference storage agreement now in preparation covering approximately 48,000 tons zinc concentrate stockpiled at Silver King, Idaho, to which we have assigned contract No. SCM-TS-12755. Please advise whether a flat rate cost per ton in and a flat rate cost per ton out inclusive of weighing on inbound and outbound in accordance with standard commercial practice would be satisfactory to your company and advise by wire the rate for such services." That is from J. E. Salisbury. The next is a telegram dated January 14, 1949. It is addressed to J. E. Salisbury and is sent by me as superintendent and is as follows: [67] "Reurtel January 13. Our total cost for stockpiling 65,000 tons zinc concentrates at Silver King, Idaho, were 84 cents per ton. Our costs for loading out approximately 17,000 of these concentrates for shipment to the Anaconda Copper Mining Company for account of Reconstruction Finance Corporation was 40 cents per ton plus \$10.00 service charge per car of approximately 50 tons or a total of 60 cents per ton. On basis these past actual costs a charge of 85 cents per ton

(Testimony of Wallace G. Wolf.)

in and a charge of 60 cents per ton out would be agreeable for the present existing stockpiles.”

Mr. Brown: We offer that exhibit,—Plaintiff’s Exhibit No. 20 in evidence.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Q. Subsequent to this exchange of telegrams as shown by Plaintiff’s Exhibit No. 20, did the Federal Bureau of Supply submit a formal contract to you? A. Yes, they did.

Q. You have been handed a letter marked Plaintiff’s Exhibit No. 21 for identification, I will ask you what that is?

A. This is a letter dated February 3, 1949, addressed to the Sullivan Mining Company, Kellogg, Idaho, and signed by Raymond Eberly, and typed under that signature is [68] H. C. Maull, Jr., Chief Purchase Division, and it reads: “Subject: Contract SCM-TS-12755. Enclosed are three copies of a formal contract embodying the agreement made with you under the above contract number.

“It is requested that all three copies of the enclosed contract be executed by an authorized official of your firm, indicating clearly his title and the date of execution, by signing the first page. In the event any changes in the document as written appears to be necessary, please communicate immediately with the Purchasing Agent of this Division with whom you have been negotiating.

“Upon return to this office of the three copies of the contract properly executed by you, they will

(Testimony of Wallace G. Wolf.)

be executed on behalf of the Government and one fully executed copy returned to you for your record." Attached to it is a copy of the contract.

Mr. Brown: I offer Exhibit No. 21 in evidence.

The Court: Do you have any objection?

Mr. Donahue: No objection.

The Court: It may be admitted. We will take a recess at this time until 10 o'clock in the morning.

November 3, 1953, 10 o'clock a.m.

Mr. Donahue: I think, if the Court please, that both sides or rather either side has a right to object to any of this documentary evidence as to its relevancy. At this time, with the Court's permission, I would like to withdraw my acquiescence to the admission of Exhibit No. 21 and I want to object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: I will grant that request and I will take your objection under advisement. When I finally act on this entire case I will either act upon this objection made now or I will just let the matter stand in the record.

Mr. Donahue: I might say to the Court, at this time, that the reason for the objection as to Exhibit No. 21 is that it is a contract that was sent to the Sullivan Mining Company by the Bureau of Federal Supply or the general services administration and I feel, that in view of the fact that the only defendant in this case is the Reconstruction Finance Corporation that this contract, which by the way, was never executed, it becomes absolutely incompetent

(Testimony of Wallace G. Wolf.)

as regard to the issues and the parties involved in this litigation. [70]

The Court: I will let it stand in the record, subject to your objection, of course, it appears to me that perhaps this matter ends about November 22, 1948, I should say October 22, 1948. It appears to me now that all of this material was stockpiled prior to October 22, 1948, and I doubt very much that any negotiations except for the settlement, after, would be material in this case. You understand, however, and I want to make it clear to counsel for both sides that I am not ruling on this at this time.

Q. Mr. Wolf, I would ask you if prior to the receipt by your company of Exhibit No. 21, had you received any type of assignment from the Reconstruction Finance Corporation?

A. Yes, we had.

Q. The bailiff has handed you some documents which have been marked as Plaintiff's Exhibit No. 22 for identification, I will ask you what they are?

A. This first is a letter dated December 21, 1948, and is signed by T. J. Doherty, Chief Stockpile Branch of the Reconstruction Finance Corporation, Office of War Activity Liquidation. It is addressed to the Sullivan Mining Company and it says: "Enclosed herewith please find counterpart of assignment executed as of November 30, 1948, by Reconstruction Finance Corporation and [71] accepted and agreed to under date of December 1, 1948, by United States of America, Treasury Department,

(Testimony of Wallace G. Wolf.)

Bureau of Federal Supply. You will note the assignment covers the captioned contract as amended between Metals Reserve Company and yourselves. Please acknowledge receipt of this instrument, which you may retain for your files. As you have been heretofore informed by us, the assignment was made in connection with the transfer to the Bureau of Federal Supply of certain material held in storage by you under said contract." On December 27, 1948, I replied to the letter of December 21, 1948, which I just quoted from and acknowledged the receipt of the letter with the enclosure of the counterpart of the assignment.

Q. Is there another instrument attached?

A. Yes, attached to it is the assignment.

Mr. Brown: I offer Plaintiff's Exhibit No. 22 in evidence, if the Court please.

Mr. Donahue: We have no objection.

The Court: It may be admitted.

Mr. Brown: I would like to have your Honor look at the assignment which raises one of the important points in this suit. I refer to the last paragraph. [72]

Q. After the receipt by your company of Exhibit No. 21 which was the tendered contract of the Federal Bureau of Supply, did your company ever execute that contract? A. No.

Q. Do you recall whether there was any correspondence back and forth in connection with the matter of your signing it or why you were not signing it? A. Yes, there was.

(Testimony of Wallace G. Wolf.)

Q. The bailiff has now handed you some documents which have been marked Plaintiff's Exhibit No. 22 for identification, will you state what they are?

A. Yes, the first is a letter under date of March 4, 1949, from the Bureau of Federal Supply and signed by Raymond Eberly and typed under that name is H. C. Maull, Jr. Referring to storage contract SMC-TS-12755 and stating: "On January 10, 1949, this office sent a telegram addressed to the Sullivan Mining Company, Kellogg, Idaho, reading as follows: "Reurtel November 19, 1948, storage and servicing zinc concentrates at Silver King, Idaho, account of Bureau of Federal Supply, same basis as in effect Reconstruction Finance Corporation, offer accepted. Contract SMC-TS-12755 follows." Then it states that on February 3, 1949, three copies of a formal contract were mailed to the Sullivan Mining Company. Then, the last paragraph: "Upon return to this office of the three [73] copies of the contract properly executed by you, they will be executed on behalf of the Government and one fully executed copy returned to you for your record." The second instrument is a letter dated March 7, 1949, addressed to the Treasury Department, Bureau of Federal Supply, and is signed by me as superintendent. It is in reply to the letter of February 3, 1949, enclosing three copies of the formal contract and it states in the second paragraph: "It is our interpretation of this contract that the Government is willing to reimburse us for the in-han-

(Testimony of Wallace G. Wolf.)

dling which was incurred on such material and which has recently been shipped out and that we presume that this applies not only to the material that will be shipped out from now on but also to the material that was shipped out from the stockpile during 1948." Then I go on in the last paragraph: "With reference to Item 14, title of property, we wish to advise that these concentrates are not stored on the property of this company but on the property of the Lead Smelter of the Bunker Hill and Sullivan M and C Company of which company ours is a subsidiary. The location of our plant is in a rather narrow gulch without ground space for such storage. The arrangement for storage on the property of the Bunker Hill was explained [74] and agreed to by the Metals Reserve at the time the original agreement was entered into. Your agency can be assured by the Bunker Hill and Sullivan M and C Company that the Government will have peaceful possession of stated zinc concentrates as required by Article 14 of the contract." The third is a letter under date of March 15, 1949, addressed to the Sullivan Mining Company signed by H. C. Maull, Jr., of the Bureau of Federal Supply, in which reference is made to my letter of March 7, 1949, relative to the delay in returning the subject contract and interpretation of certain articles of the contract. Stating in the second paragraph: "In reference to paragraph No. 2 of your letter the interpretation is correct, except that all charges incident to storage and handling of this material in

(Testimony of Wallace G. Wolf.)

and out of storage on and after December 1, 1948, are for the account of Bureau of Federal Supply.” And then in the third and fourth paragraph of the letter they simply go on to state that the fact that the material was on the property of Bunker Hill and Sullivan Mining and Concentrating Company was all right. The final instrument is a letter dated March 24, 1949, to the Treasury Department, Bureau of Federal Supply, signed by myself as superintendent, and acknowledging receipt of their letter of March 15 and referring to the second [75] paragraph it says: “With reference to paragraph two of your letter, we incurred charges incident to the storage and handling of this material prior to December 1, 1948, as well as after December 1, 1948. When the Bureau of Federal Supply took over the assets of the Reconstruction Finance Corporation it also took over its liabilities and obligations. By the statement referred to in your letter you agree on the principle but applying it only after December 1, 1948. This same principle should apply also for the expenses incurred by this company prior to December 1, 1948. We would like to have the equity of the principle of storage charges clearly established before executing the copies of the contract and returning the same to the Bureau as requested by you.”

Mr. Brown: We offer Exhibit No. 23 in evidence at this time, if the Court please.

Mr. Donahue: Now, if the Court please, at this time the defendant Reconstruction Finance Cor-

(Testimony of Wallace G. Wolf.)

poration objects to the admission of Plaintiff's Exhibit 23 which consists of a series of letters and replies between the Sullivan Mining Company and the Treasury Department, Bureau of Federal Supply. All of this correspondence is dated in the month of March, 1949, which is several months subsequent to the date [76] when the Reconstruction Finance Corporation, by virtue of Exhibit No. 22 assigned all of its interest in this contract and the amendments thereto to the Treasury Department, Bureau of Federal Supply, therefore, I believe that it becomes immaterial to this case. This objection is raised and presented upon the further grounds that this is an action in which the Sullivan Mining Company is the plaintiff and the Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States Government, is defendant. I feel, or rather I want to state my view, that all of this correspondence which refers to negotiations between the Treasury Department, Bureau of Federal Supply, and the plaintiff is entirely irrelevant to the issues in the case that is being tried in this Court between the Sullivan Mining Company and the Reconstruction Finance Corporation.

The Court: Haven't you made it an issue by your answer? I will study that out later. I will overrule the objection at this time and admit the exhibit, however, I am doing so because this being a Court case I have control of it and I will strike it on my own motion if I find it is not admissible.

(Testimony of Wallace G. Wolf.)

The idea occurs to me that all of the dealings, that is, so far as the money that the plaintiff might be entitled to, all of [77] the dealings seem to have been prior to October 22, 1948, and all of this money was earned, if it was earned at all, prior to that date. You say if there was an obligation there it was assumed under the assignment of the contract. This testimony goes to show that if it was assumed, the plaintiff here never released Reconstruction Finance Corporation from the obligation. I may not have it clear at this time but that is the way it looks to me now and I think that you appreciate that I am going to have a great deal of work to do here after you gentlemen get through. I have not taken time to read any of these exhibits, I have only listened to this witness explain them and quote at some length from the exhibits, I will have to read these and I felt that having control that I could reconsider some of these matters more fully. Had I had a jury here I would have ruled more cautiously. I think you may proceed now, Mr. Brown.

Q. As a result of this correspondence, did your company sign the contract? A. No.

Q. The bailiff has handed you two documents which have been marked for identification as Plaintiff's Exhibit No. 24. I will ask you what they are.

A. The first is a letter from the Bureau of Federal Supply [78] dated June 23, 1949, and it is addressed to the Sullivan Mining Company, subject contract SCM-TS-12755, and reads as follows: "Ref-

(Testimony of Wallace G. Wolf.)

erence is made to your letter of March 24, 1949, relative to storage and handling charges under the subject contract. It is the intent of the contract that you will be paid for unloading and handling inbound, and handling, loading and weighing outbound, in accordance with the terms and conditions of the contract, for all materials to be shipped to another location on or after December 1, 1948.

"The subject of liability for such charges for material which was shipped out prior to December 1, 1948, is still a matter of dispute between the Reconstruction Finance Corporation and this Bureau. It is anticipated that a settlement will be reached in the near future, and you will be promptly advised as to the Government agency liable for such claims." And that is signed by H. C. Maull, Jr., Chief, Purchase Division. The second document is a letter from the Bureau of Federal Supply dated August 9, 1949, and is addressed to the Sullivan Mining Company and signed by Mr. H. C. Maull, Jr. It states: "By letter dated June 23, 1949, you were advised that the subject of liability for charges for material shipped out prior to December 1, 1948, was a matter of discussion between this Bureau and the [79] Reconstruction Finance Corporation. All questions arising out of such discussions have now been settled and it has been determined that, as expressed in previous letters, this Bureau will not be liable for charges for material shipped to another location prior to December 1, 1948. Claims representing such charges are properly for con-

(Testimony of Wallace G. Wolf.)

sideration by the Reconstruction Finance Corporation and the contract which has been forwarded to you is designed to cover contractual relationships between your company and the Bureau of Federal Supply from the period beginning December 1, 1948.

“It is hoped that in the light of the above information you will see your way clear to executing the contracts previously mailed to you. If such is the case, the procedure outlined in our letter dated February 3, 1949, should be followed in the execution thereof.”

Mr. Brown: At this time we offer Exhibit No. 24 in evidence.

Mr. Donahue: And I make the same objection.

The Court: It may be admitted under the same ruling.

Q. As a result of that correspondence, did your company execute the contracts?

A. No. [80]

Q. In August, 1949, at the time of this correspondence, what concentrates were still in stockpile, —in the Government stockpile or the Reconstruction Finance Corporation stockpile?

A. There was the balance of the concentrates that had been stored for the Government account less some 17,500 odd tons that had been removed and shipped to the Anaconda Copper Mining Company the previous year.

Q. So that at the time of all of this correspondence as evidenced by Exhibit 24 and 25 the concen-

(Testimony of Wallace G. Wolf.)

trates were still in stockpile with the exception of 17,500 tons previously shipped? A. Yes.

Q. The bailiff has handed you an instrument marked Plaintiff's Exhibit No. 25 for identification. I will ask you, Mr. Wolf, what that is?

A. It is a letter written by me as superintendent, addressed to the Bureau of Federal Supply under date of August 25, 1949: "This is written in answer to your letter of August 9, 1949, concerning contract SCM-TS-12755. Reference is also made to your letter of February 3, 1949, enclosing copies of this contract and other correspondence on this subject.

"In our original agreement with Metals Reserve Company of June 18, 1942, and subsequent renewals of [81] this agreement we undertook to purchase for the account of Metals Reserve Company, zinc concentrates tendered to us in excess of our processing capacity and to stockpile them. The same contract provided for our repurchasing all or part of this material from time to time as we were able to treat same. It was with this commitment that we agreed to provide storage and to stockpile at our expense. We offered through Mr. Charles R. Ince, manager of Metal Sales of the St. Joseph Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provision as set forth in the agreement of June 18, 1942, in fact, we made a better offer to you than the one so provided because we agreed to deliver to you 85 per cent of the contained zinc as compared to

(Testimony of Wallace G. Wolf.)

the payment of 80 per cent of the zinc content as our present zinc concentrate purchase schedules and contracts provide. Notwithstanding this we are now advised by Mr. Ince that our offer was rejected by you although as yet we have had no direct advice from you to this effect. We respectfully request that we have your formal advice on this matter.

“On the assumption that our offer to treat the stored zinc concentrates is rejected and that the concentrates will be loaded and shipped elsewhere, [82] we, of necessity, are making a determined effort to locate other concentrates for purchase as a replacement. If we are successful in this we doubt that we can make arrangement for the loading and shipment of your concentrates to your new customer. As previous correspondence referred to above has informed you, the Bunker Hill smelter has in the past serviced our concentrates in and out of stockpiles because we ourselves have neither the available storage space nor suitable equipment. The Bunker Hill smelter now advises us that with our own expanded operations because of the recent zinc plant enlargement they will only be able to service our current operations. They inform us that only a very limited amount of time will be available for additional extra work and such work will no doubt entail overtime rates. In any event, they state the existing equipment and personnel would not permit the loading of more than 3,000 tons per month from your stockpile. We do not know the monthly tonnage you plan to have loaded and shipped from

(Testimony of Wallace G. Wolf.)

your local stockpiles, although Mr. Ince has informed us that much larger tonnages than the above mentioned 3,000 tons per month were contemplated.

"Under the conditions above stated we, therefore, do not feel in a position to execute the contract as far as it pertains to the loading and the shipment of your [83] concentrates."

Mr. Brown: We offer Exhibit No. 25 in evidence at this time.

Mr. Donahue: May I ask a question on voir dire?

The Court: Yes, you may.

Q. (By Mr. Donahue): Mr. Wolf, who is Mr. Charles R. Ince?

A. Mr. Charles R. Ince was the sales manager for the St. Joseph Lead Company. The St. Joseph Lead Company is our selling agent for zinc in the United States east of the 95th Meridian and all export sales of zinc.

Q. In paragraph three of this letter, Plaintiff's Exhibit 25, that you have been referring to, you state in that letter to the Treasury Department as follows: "We offered through Mr. Charles R. Ince, manager of Metal Sales of the St. Joseph Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provision as set forth in the agreement of June 18, 1942." Do you have any correspondence in your files between Mr. Ince and the Treasury Department?

A. There may be some correspondence in our

(Testimony of Wallace G. Wolf.)

files, I am uncertain of that. The situation was this, that Mr. Ince in his position as sales manager of the St. Joseph Lead [84] Company, selling both lead and zinc, was on some of the advisory committees in Washington and the result was that he was in and out of Washington quite frequently and for convenience he took up this matter for us in the matter of arranging for the sale to us of those remaining concentrates under the terms of the contract and we gave him certain schedules which he presented for us.

Q. Do you know, approximately, the date that Mr. Ince, as you say, made these representations or offers to the Treasury Department?

A. To my recollection it was shortly prior to the date of that letter.

Q. Do you have any correspondence with Mr. Ince, directing him to make this offer to the Treasury Department?

A. I am uncertain as to that. I may have some in my files but I recall that part of the matter was taken up with Mr. Ince over the telephone because it was a matter of expediting things.

Q. Do you have any correspondence from the Treasury Department indicating that they declined the offer from Mr. Ince?

A. No, I requested that in a letter to the Treasury Department but I never received any reply in answer to that letter.

Q. Did you, at any time, yourself, or through

(Testimony of Wallace G. Wolf.)

Mr. Ince [85] renew your demand which you claimed,—not demand but offer?

A. As I recall, Mr. Ince subsequent to that time did try to get our offer reinstated but he was not successful.

Q. Do you know whether Mr. Ince ever corresponded directly with the Treasury Department or with the Bureau of Federal Supply?

A. Yes, I think he did correspond directly.

Q. But you don't definitely know of your own knowledge?

A. Yes, I think I have some copies of his letters, copies of that correspondence.

Q. If you have copies of letters relative to this transaction between Mr. Ince and the Treasury Department, Bureau of Federal Supply, will you try to find them for us so that we can look at them?

A. Yes.

Q. You say that this offer was made shortly before this letter was written?

A. To my recollection, yes.

Mr. Donahue: That is all on the voir dire. I do want to interpose an objection to paragraph three of Plaintiff's Exhibit No. 25 upon the ground that it is incompetent, irrelevant and immaterial, also upon the further ground that it is hearsay. It is apparently an offer made to the Treasury Department, [86] Bureau of Federal Supply, by the St. Joseph Lead Company which is not a party to this litigation.

(Testimony of Wallace G. Wolf.)

The Court: I am inclined, at this time, to think that your objection is well taken. A moment ago I used the date of October 2, 1948. I think I should have used the date of June 30, 1948. I think that is the last stockpiling for the Government, however I can check on that. All of these letters and negotiations after that date, whichever date is correct, was just trying to get the matter straightened out. However, I am going to admit this letter the same as I did the others, it will be admitted subject to the objection. I think I have somewhat of an understanding of the situation that we are faced with here. I am a little undecided as to what the relevancy of the later letters are, except that they seem to be material in answering your contention in your answer in this cause.

Mr. Brown: I know that your Honor has not had an opportunity to examine these exhibits, unless you stayed all of last night to make that examination. It perhaps is not clear as to the purpose of these exhibits because of the fact that you have not had that opportunity and I would like to make it clear as to why we think they are relevant in this matter. The original contract of June 18, 1942, provided that Sullivan Mining [87] Company should stockpile concentrates for the Metals Reserve Company at Sullivan's expense. That contract, at that time, provided and contemplated that Sullivan was going to process all of those concentrates. The amendment of July 12, 1944, gave the right for modification, gave the Reconstruction Finance Cor-

(Testimony of Wallace G. Wolf.)

poration or the Metals Reserve Company the right, for the first time to remove——

The Court: ——I think that I have this absolutely clear at this time.

Mr. Brown: Our point is that the stockpiling costs were out-of-pocket, but the liability did not accrue until the concentrates were removed because no one knew at that time or until then how many were going to be removed.

The Court: As I said, it was up until June 30, 1948, that the Sullivan Company stockpiled this material and while they were stockpiling it they contemplated that they were going to treat it. There is one question here that I was going to ask of this witness before he left the stand and that was, what advantage it was to the Sullivan Mining Company to stockpile this material unless they were going to treat it.

Mr. Brown: You may answer that, Mr. Wolf.

A. The answer to that is none.

The Court: That is the way I took it, so that the only object you had in stockpiling this material was to have the privilege of treating it.

A. Yes, sir.

The Court: I think I have the matter pretty well in mind now as far as the evidence has gone.

Mr. Brown: I wonder if we might have a few minutes recess, if the Court please, because I think with that we may be able to eliminate some of these matters and shorten up the trial.

The Court: Just as you wish, there are several

(Testimony of Wallace G. Wolf.)

questions here to determine. I don't like to make a statement such as I have made a few minutes ago because I am afraid that when I get this all cleared up in my mind that I may be wrong and may have to change any ideas that I have at this time. We will take a ten minute recess. I want you gentlemen on both sides to go right ahead and please don't take any remark that I have made as any indication as to how I might feel on this matter when it is submitted.

Mr. Brown: I think we understand that, your Honor.

Mr. Donahue: Yes, indeed, that is perfectly clear to us, we have no doubt of that, your Honor.

November 3, 1953, 11:10 a.m.

Q. Mr. Wolf, some questions were asked you with respect to Mr. Charles R. Ince and the St. Joseph Lead Company, is that company a subsidiary of yours? A. No.

Q. Is there any ownership at all in your company of that company?

A. None, whatever. The St. Joseph Lead Company sells our zinc. Our zinc is a special high grade premium zinc and the St. Joseph Lead Company as a company produces other grades of zinc but they do not produce special high grade zinc and they act as our sales agent for this special high grade zinc. It is a special advantage to us and to them because it rounds out their sales of all grades of zinc to the trade.

(Testimony of Wallace G. Wolf.)

Q. Mr. Wolf, earlier in your testimony and in one of the exhibits, it became apparent that RFC had in 1946 requested you to process a portion of the stockpiles and at that time you had not had adequate facilities and you gave certain reasons in your testimony, I believe, with respect to manpower and, in fact, you, at one time, had to shut down one of the units, I believe. At the time that you offered to purchase the remaining part of the stockpile in 1949, as evidenced in Exhibit No. 25, had there been some change [90] in your condition or your facilities?

A. Yes, as I testified earlier, our zinc plant in those earlier years consisted of three electrolytic units. In the years subsequent to that we added an additional fourth electrolytic unit with necessary auxiliary enlargement of the remaining parts of the plant so that late in 1949 we had four units and the plant was correspondingly enlarged. The cost of that unit, the fourth unit, was somewhere in the range of two and a half million dollars.

Q. Did that put you in a position to handle these concentrates at the time this offer was made?

A. Yes.

Q. I will ask you, shortly after your communication of August 25, 1949, plaintiff's Exhibit No. 25, whether the concentrates in the stockpile were removed?

Mr. Donahue: What was that date, Mr. Brown?

Mr. Brown: After his letter of August 25, 1949. That is Plaintiff's Exhibit No. 25, Mr. Donahue,

(Testimony of Wallace G. Wolf.)

that question was whether the concentrates in the stockpile were removed?

A. Yes, they were.

Q. Mr. Wolf, the bailiff has handed you instrument marked Plaintiff's Exhibit No. 26 for identification, I will [91] ask you to state what that is?

A. That is a letter under date of September 20, 1949, from the General Services Administration, Bureau of Federal Supply. It is air mail special delivery and addressed to the Sullivan Mining Company and states: "Enclosed herewith are 15 government bills of lading", then it gives their numbers, and then it continues: "To be used for the movement of zinc concentrates from storage at Silver King, Idaho, to Anaconda Copper Mining Company, Wallace, Idaho. These bills of lading are sent to you in advance so that there will be no delay in the movement of the zinc concentrates. Complete instructions for their use will follow either by telegram or letter within a few days." That letter is signed by A. G. Wildberger, Chief, Storage and Transportation Division.

Mr. Donahue: What is the date of that letter, Mr. Wolf, I didn't get that?

A. September 20, 1949.

Mr. Brown: I offer Exhibit No. 26 in evidence at this time.

Mr. Donahue: To which exhibit the defendant objects upon the ground that it is incompetent, irrelevant and immaterial, having to do with a situation existing between the Bureau of Federal Supply,

(Testimony of Wallace G. Wolf.)

Treasury Department, and the Sullivan Mining Company, a considerable [92] time subsequent to the assignment.

The Court: It will be admitted subject to your objection.

Q. Did you subsequently receive shipping instructions? A. We did.

Q. The bailiff has handed you a series of instruments which are marked Plaintiff's Exhibit No. 27 for identification, I will ask you, Mr. Wolf, what they are?

A. This is a series of letters and telegrams interchanged between the General Services Administration and the Sullivan Mining Company, referring to the shipping out of these concentrates to the Anaconda Copper Mining Company. Various directions and bills of lading and details that we handled in the servicing of the loading out of these concentrates for the Bureau. The actual loading out was done by an independent contractor but we handled for him the bills of lading and the necessary Government paperwork involved in it.

Mr. Brown: We offer Exhibit No. 27 in evidence at this time.

Mr. Donahue: The defendant objects to the admission of Plaintiff's Exhibit No. 27 upon the ground that it is incompetent, irrelevant and immaterial as far as this case is concerned and the parties involved here.

The Court: It apparently shows, throughout [93] the exhibit, what became of the concentrates. It

(Testimony of Wallace G. Wolf.)

seems to me that it is material in showing that the concentrates were not treated by the plaintiff but were shipped elsewhere for treatment, objection is overruled and they will be admitted.

Q. Mr. Wolf, I understood in the course of your identification of the exhibit that your company did not actually load out those concentrates?

A. No, the actual loading out was done by a local contractor who had the necessary equipment, it was Mr. E. G. Smith of Wallace. He loaded the concentrates and transported them by truck to Wallace, Idaho, and loaded them into the railroad cars. They were shipped over the Northern Pacific from Wallace to the Anaconda Copper Mining Company. We handled all of the paper work and so on that was necessary for the loading out and prepared the Government documents that had to do with the loading out of the concentrates.

Q. Were the costs of this series of telegrams of yours included in your statement?

A. They were not.

Q. Was any part of the charge at any time, for any supervision, from 1942 up to and through 1950, when the last concentrates were shipped, any part of the claim here against Reconstruction Finance Corporation? [94]

A. No, those charges are not a part of the claim, no, sir.

Q. Mr. Wolf, the bailiff has handed you an instrument,—there are two instruments, it is marked

(Testimony of Wallace G. Wolf.)

as Plaintiff's Exhibit No. 28 for identification, I will ask you what that exhibit is?

A. The first is a letter under date of March 4, 1950, written by me as superintendent, addressed to Mr. J. E. Salisbury, Chief, Storage and Transportation Division, General Service Administration, Bureau of Federal Supply; it states: "Reference is made to your request at the conference in your office on February 17, 1950, that I write you giving a break-down of costs representating the 85 cents per ton in-bound cost of placing concentrates in stockpile storage, which concentrates have been and are now being removed pursuant to your shipping instruction of September 21, 1949." Then followed a telegram or rather a copy of a telegram dated January 13, 1949, addressed to the Sullivan Mining Company for my attention: "Reference storage agreement now in preparation covering approximately 48,000 tons zinc concentrates stockpiled at Silver King, Idaho, to which we have assigned contract No. SCM-TS-12755, please advise whether a flat rate cost per ton in and a flat rate per ton out inclusive of weighing on inbound and out-bound in accordance with standard commercial practice would be satisfactory to your company and advise by wire [95] the rate for such services." That is signed by J. E. Salisbury. Then there is another, a reply telegram under date of January 14, 1949,—

Q. That is a long letter, Mr. Wolf, for the purpose of identifying it will you state whether or not there is a break-down of the entire cost of the stock-

(Testimony of Wallace G. Wolf.)

seems to me that it is material in showing that the concentrates were not treated by the plaintiff but were shipped elsewhere for treatment, objection is overruled and they will be admitted.

Q. Mr. Wolf, I understood in the course of your identification of the exhibit that your company did not actually load out those concentrates?

A. No, the actual loading out was done by a local contractor who had the necessary equipment, it was Mr. E. G. Smith of Wallace. He loaded the concentrates and transported them by truck to Wallace, Idaho, and loaded them into the railroad cars. They were shipped over the Northern Pacific from Wallace to the Anaconda Copper Mining Company. We handled all of the paper work and so on that was necessary for the loading out and prepared the Government documents that had to do with the loading out of the concentrates.

Q. Were the costs of this series of telegrams of yours included in your statement?

A. They were not.

Q. Was any part of the charge at any time, for any supervision, from 1942 up to and through 1950, when the last concentrates were shipped, any part of the claim here against Reconstruction Finance Corporation? [94]

A. No, those charges are not a part of the claim, no, sir.

Q. Mr. Wolf, the bailiff has handed you an instrument,—there are two instruments, it is marked

(Testimony of Wallace G. Wolf.)

as Plaintiff's Exhibit No. 28 for identification, I will ask you what that exhibit is?

A. The first is a letter under date of March 4, 1950, written by me as superintendent, addressed to Mr. J. E. Salisbury, Chief, Storage and Transportation Division, General Service Administration, Bureau of Federal Supply; it states: "Reference is made to your request at the conference in your office on February 17, 1950, that I write you giving a break-down of costs representating the 85 cents per ton in-bound cost of placing concentrates in stockpile storage, which concentrates have been and are now being removed pursuant to your shipping instruction of September 21, 1949." Then followed a telegram or rather a copy of a telegram dated January 13, 1949, addressed to the Sullivan Mining Company for my attention: "Reference storage agreement now in preparation covering approximately 48,000 tons zinc concentrates stockpiled at Silver King, Idaho, to which we have assigned contract No. SCM-TS-12755, please advise whether a flat rate cost per ton in and a flat rate per ton out inclusive of weighing on inbound and out-bound in accordance with standard commercial practice would be satisfactory to your company and advise by wire [95] the rate for such services." That is signed by J. E. Salisbury. Then there is another, a reply telegram under date of January 14, 1949,—

Q. That is a long letter, Mr. Wolf, for the purpose of identifying it will you state whether or not there is a break-down of the entire cost of the stock-

(Testimony of Wallace G. Wolf.)

piling of these concentrates,—the entire tonnage, received, whether it was furnished at the request of Mr. Salisbury?

A. Yes, sir, there is.

Q. Is there attached to that letter, and as a part of the exhibit, a complete break-down of the cost?

A. Yes, sir, it is headed “cost of placing zinc concentrates into stockpile storage June, 1942, through November, 1946.”

Q. Is there an allocation of the cost between those that were stockpiled under the Metals Reserve Company agreement and the cost of your own stockpile?

A. There was, as I explained previously, in my earlier testimony, I am quite certain,—the cost for the Bunker Hill smelter charges were made to us on a total basis. We were stockpiling concentrates for the Sullivan Mining Company account and we were also stockpiling concentrates for the Metal Reserve account and charges were made to us and paid by us, disregarding what stockpile the concentrates were going into. On this final statement we show the tons that were stockpiled for the Sullivan Mining Company and the tons stockpiled for the Federal [96] Reserve and the proportionate cost.

Q. You mean that were stockpiled under the original stockpiling contract?

A. The entire stockpile.

Q. What is the total tonnage allocated to them?

A. 72,263 and 64/100 tons,—if I said Federal

(Testimony of Wallace G. Wolf.)

Reserve in my previous answer it should have been Metals Reserve Company, that was the account.

Q. And what was the cost figure?

A. \$54,864.10.

Mr. Brown: I offer Exhibit No. 28 in evidence at this time, and, if your Honor please, if there is any question about this I will connect it up with the next exhibit which we think is most material to our theory and our position in this case. If the Court wishes to reserve ruling on this matter until I offer the next exhibit, that would be agreeable because we think it is most material and important.

Mr. Donahue: At this time, if the Court please, I will make the same objection with reference to the Reconstruction Finance Corporation, the defendant in this case. This Exhibit No. 28 becomes entirely irrelevant and immaterial.

The Court: I understand that counsel is going to connect it up to some extent. It will be admitted.

Q. Mr. Wolf, the bailiff has handed you two instruments which are marked for identification as Plaintiff's Exhibit No. 29, I will ask you what they are?

A. The first is a letter under date of March 1, 1950, to the Sullivan Mining Company and it is signed by J. E. Salisbury, Chief, Storage and Transportation Division, the subject is Contract AA-29, unloading of zinc concentrates, and is as follows: "Reference is made to discussion of February 17, 1950, in the office of the undersigned, wherein it was agreed that the General Services Administra-

(Testimony of Wallace G. Wolf.)

piling of these concentrates,—the entire tonnage, received, whether it was furnished at the request of Mr. Salisbury?

A. Yes, sir, there is.

Q. Is there attached to that letter, and as a part of the exhibit, a complete break-down of the cost?

A. Yes, sir, it is headed “cost of placing zinc concentrates into stockpile storage June, 1942, through November, 1946.”

Q. Is there an allocation of the cost between those that were stockpiled under the Metals Reserve Company agreement and the cost of your own stockpile?

A. There was, as I explained previously, in my earlier testimony, I am quite certain,—the cost for the Bunker Hill smelter charges were made to us on a total basis. We were stockpiling concentrates for the Sullivan Mining Company account and we were also stockpiling concentrates for the Metal Reserve account and charges were made to us and paid by us, disregarding what stockpile the concentrates were going into. On this final statement we show the tons that were stockpiled for the Sullivan Mining Company and the tons stockpiled for the Federal [96] Reserve and the proportionate cost.

Q. You mean that were stockpiled under the original stockpiling contract?

A. The entire stockpile.

Q. What is the total tonnage allocated to them?

A. 72,263 and 64/100 tons,—if I said Federal

(Testimony of Wallace G. Wolf.)

Reserve in my previous answer it should have been Metals Reserve Company, that was the account.

Q. And what was the cost figure?

A. \$54,864.10.

Mr. Brown: I offer Exhibit No. 28 in evidence at this time, and, if your Honor please, if there is any question about this I will connect it up with the next exhibit which we think is most material to our theory and our position in this case. If the Court wishes to reserve ruling on this matter until I offer the next exhibit, that would be agreeable because we think it is most material and important.

Mr. Donahue: At this time, if the Court please, I will make the same objection with reference to the Reconstruction Finance Corporation, the defendant in this case. This Exhibit No. 28 becomes entirely irrelevant and immaterial.

The Court: I understand that counsel is going to connect it up to some extent. It will be admitted.

Q. Mr. Wolf, the bailiff has handed you two instruments which are marked for identification as Plaintiff's Exhibit No. 29, I will ask you what they are?

A. The first is a letter under date of March 1, 1950, to the Sullivan Mining Company and it is signed by J. E. Salisbury, Chief, Storage and Transportation Division, the subject is Contract AA-29, unloading of zinc concentrates, and is as follows: "Reference is made to discussion of February 17, 1950, in the office of the undersigned, wherein it was agreed that the General Services Administra-

(Testimony of Wallace G. Wolf.)

tion, Federal Supply Service, as assignee under the captioned contract, would reimburse you for unloading expenses incurred in connection with the tonnage removed from your premises under our instructions, provided such expenses were payable under the terms of AA-29. After a thorough examination and review, it is our considered opinion that there is no liability on our part under the contract in regard to unloading expenses. We base this opinion on the following:

(1) The original contract provided that your company should bear the expense of stockpiling.

(2) The amendment of July 12, 1944, limited reimbursement in the event the concentrates were shipped elsewhere to the cost of removal. [98]

"We trust that you are in accord with the above." The second instrument is a letter from the Treasury Department, Bureau of Federal Supply, dated March 10, 1950, addressed to me as superintendent, Sullivan Mining Company, and is signed by J. E. Salisbury, Chief, Storage and Transportation Division, and is as follows: "Subject: Contract AA-29, unloading of zinc concentrates. Thank you for your letter of March 4, 1950, in regard to the above subject. The contents have been duly noted, however, same does not alter the opinion expressed in our letter of March 1, 1950, which apparently crossed yours in the mail."

Mr. Brown: We offer Exhibit No. 29 at this time as proof that the purported assignment from the Reconstruction Finance Corporation, Bureau of

(Testimony of Wallace G. Wolf.)

Federal Supply never became effective; that there was nothing more than a physical custody of the stockpile which right they had under the amendment of July 12, 1944. That the reason the assignment was not effective was that this exhibit shows that the Sullivan Mining Company, by Exhibit No. 28 had set forth the entire cost, at their request, of this stockpiling and had been refused every part of the obligation. They actually and expressly refused to assume the obligation of the Reconstruction Finance Corporation, by these exhibits which made the [99] assignment,—a unilateral assignment, by the way,—ineffective. On that theory, if the Court please, we introduce this exhibit.

Mr. Donahue: If the Court please, in reference to Plaintiff's Exhibit No. 29, the defendant, Reconstruction Finance Corporation, objects to the same upon the ground that it is incompetent, irrelevant and immaterial, having to do with a situation that was strictly between the Treasury Department, Bureau of Federal Supply, and not with the Reconstruction Finance Corporation, as such.

The Court: I will admit it under the same ruling that I made in connection with other exhibits. After studying the matter it will be stricken if I feel that your objection is well taken.

Mr. Donahue: Thank you.

Q. Mr. Wolf, I notice in examining Plaintiff's No. 28, containing the breakdown of the costs through the period of stockpiling, that during the years 1942 and 1943 aside from the crane unloading

(Testimony of Wallace G. Wolf.)

expense, there was very little expense with respect to the cost of lumber and labor, can you explain the reason for that?

A. When the stockpiling of the Government concentrates began, the first stockpiling was placed in bins that the Sullivan Mining Company had been using on the Bunker [100] Hill smelter ground. Later on the smelter itself made available to us other bins by moving some of their material out and giving us those bins for use in stockpiling these concentrates, so at the start there was comparatively little expense for building bins. Later on, after we used up all of the bins available we had to start constructing further additional bins and then the cost increased.

Q. Would it have been necessary for you, in the conduct of the operation of your electrolytic zinc plant, to have built this series of bins had you not entered into the contract with the Metals Reserve Company for stockpiling concentrates?

A. Definitely no.

Mr. Brown: You may take the witness.

Cross Examination

Q. (By Mr. Donahue): Mr. Wolf, did you state what your position with the Sullivan Mining Company was?

A. Yes, sir, I am the superintendent of the electrolytic zinc plant of the Sullivan Mining Company.

Q. What connection is there, if any, between the

(Testimony of Wallace G. Wolf.)

Bunker Hill Smelter and the Bunker Hill and Sullivan Mining Company?

A. The Bunker Hill Smelter is a smelting operation that [101] is owned and operated by the Bunker Hill and Sullivan Mining and Concentrating Company.

Q. Then as I understand it, the Sullivan Mining Company, the Bunker Hill and Sullivan Mining Company and the Bunker Hill Smelter are separate corporations but work practically as a unit, is that correct?

A. The Bunker Hill and Sullivan Mining and Concentrating Company and the Sullivan Mining Company are separate corporations. The Bunker Hill Smelter is a part of the Bunker Hill and Sullivan Mining and Concentrating Company. All three operations, the operation of the Bunker Hill mines and the concentrating mills, the Bunker Hill Smelter and the Bunker Hill and Sullivan Mining and Concentrating Company are under the management of Mr. Haffner and he is also the manager of the Electrolytic Zinc Plant of the Sullivan Mining Company, so that in reality there is a very close cooperation among the three.

Q. Is there a stock ownership between the companies?

A. As I explained in previous testimony, the Sullivan Mining Company is a separate corporation and is owned by the Bunker Hill and Sullivan Mining and Concentrating Company and the Hecla

(Testimony of Wallace G. Wolf.)

Mining Company on a 50-50 basis, each company owns 50 per cent of the stock.

Q. Now, the Bunker Hill and Sullivan Mining and Smelting [102] Company take care of what sort of an area, what sort of mineral area?

A. The Bunker Hill and Sullivan Mining and Concentrating Company, to my understanding, takes care of its own Bunker Hill mine and it is also, so far as the smelter is concerned, it is a custom smelter and treats lead concentrates from various sources of supply, not only including the Coeur d'Alene mining district mines but other mines as well.

Q. It is a fact that the Bunker Hill and Sullivan Company, which owns one half of the Sullivan Mining Company, does treat a great proportion of the ores produced in the Coeur d'Alene district, is that correct,—a great proportion of the concentrates produced in that area or district.

A. They treat and handle a considerable proportion, however, there is a large production from properties owned by the American Smelting and Refining Company that are not handled or treated by the Bunker Hill and Sullivan Mining and Concentrating Company.

Q. Where does the American Smelting and Refining Company treat their concentrates?

A. It is my understanding that they are treated at their West Helena, Montana, smelter.

Q. It is a fact, is it not, that it is the policy of the [103] Sullivan Mining Company to endeavor

(Testimony of Wallace G. Wolf.)

to cooperate with the small mining properties in the Coeur d'Alene district as much as possible?

A. That is true.

Q. And it is a fact also, is it not, that the Sullivan Mining Company and the Bunker Hill and Sullivan Mining Company are anxious to obtain ores and concentrates,—zinc and lead ores and concentrates from all of those small operations in the Coeur d'Alene district?

A. Yes, in general, that is a true statement. We do want to treat their products.

Q. As a matter of fact, the future of the Coeur d'Alene district probably now rests on the small individual operator?

A. I would not say that.

Q. It is the history of mining, is it not, that it is the small prospector or the small operator that very often goes out and originally discovers these big mines?

A. That is true.

Q. These are usually, later, affiliated with the larger companies and it becomes a matter of good business for every one, is that true,—I mean, they may become affiliated with companies like the Sullivan Mining or the Bunker Hill and Sullivan Mining and Smelting Company?

A. That is true, except to my knowledge, in the district [104] there is considerable amount of important development work for the discovery it is hoped, of new deposits and the major portion of that work is being done by the Bunker Hill and Sullivan Mining and Concentrating Company and

(Testimony of Wallace G. Wolf.)

the Hecla Company, who are the joint owners of the Sullivan Mining Company and also the American Smelting and Refining Company.

Q. But what I am chiefly getting at is that your company or companies, the Sullivan Mining Company and the Bunker Hill and Sullivan Company very definitely do have the interest of the small operator at heart? A. That is true.

Q. Now, when this stockpiling agreement was entered into you say that there were about 47 shippers that shipped to that stockpile, is that correct?

A. Later on, as the program developed, yes. At the start, the commencement of the stockpiling, to my recollection, we had something like 15 shippers and that was later increased, during the premium price plan to a total of 47 shippers.

Q. Now, would you be able to tell me what mines besides the Sullivan Mining Company were either operated by the Sullivan Mining Company or mines in which the Sullivan Mining Company were financially interested that shipped to the stockpiles?

A. Would you repeat that question?

Q. Yes, tell me if you can, what mines besides your mine or mines operated by you or in which the Sullivan Mining Company had a financial interest were shipping to this stockpile?

A. To my recollection, the only mine that the Sullivan Mining Company was interested in financially was its Star mine, that is owned and operated by the Sullivan Mining Company.

Q. There were concentrates shipped to that

(Testimony of Wallace G. Wolf.)

stockpile that came out of the Bunker Hill and Sullivan mine, were there not?

A. Yes, we treat and process the zinc concentrates from the Bunker Hill and Sullivan mine.

Q. And there were concentrates that went into the stockpile that came from the Hecla?

A. The Hecla Mining Company, as a result of the premium price plan, processed tailings that had been lying for many years in the Coeur d'Alene River Valley,—these concentrates, that is, the concentrates resulting from the tailing treatment were also sold to the Sullivan Mining Company and shipped to the stockpile.

Q. You explained this plan yesterday, as I recall it, that is, the premium price plan and as I understand it, that was the payment by the Government for over-quota production, is [106] that correct?

A. That is true.

Q. Is it true, Mr. Wolf, that the Sullivan Mining Company and the Star Mining Company and any other mining company that the Sullivan Mining Company was interested in all got the benefit of this over-quota payment plan, the premium payment plan?

A. The Star Mine of the Sullivan Mining Company may or may not have had a quota, I cannot answer definitely as to that.

Q. Well, will your records show whether or not it did have a quota?

A. Yes, I suppose our records of receipts of

(Testimony of Wallace G. Wolf.)

zinc concentrates would indicate if the Star Mine had a quota.

Q. Calling your attention to Exhibit No. 28,—just go to the last page of that exhibit,—the breakdown is what I am referring to, the last page indicates that there was a total of 86,000 tons of concentrate in that stockpile, is that correct?

A. That is correct.

Q. Out of that total, 72,263 tons were for the account of the Metals Reserve Company?

A. Yes, sir.

Q. Now, would you be able to tell me, Mr. Wolf, out of that 72,000 tons that were stockpiled for the account of [107] Metals Reserve Company, how much of those concentrates were furnished by your Star Mining Company?

A. I can't off-hand, I would have to refer to our records.

Q. Handing you what has been marked Defendant's Exhibit No. 30, which is a letter to Mr. Borel, Supervising Engineer, Reconstruction Finance Corporation, by or from Mr. T. J. Doherty, setting out the amount of concentrates that were stockpiled under contract AA-29 and giving the names of certain operators, I will ask you to state whether or not that is approximately correct in your opinion or from your records?

The Court: Will you show that exhibit to Mr. Brown. Now, Mr. Brown, do you have any objection? Are you offering this at this time, Mr. Donahue?

(Testimony of Wallace G. Wolf.)

Mr. Donahue: I am going to offer it in evidence, if the Court please.

Mr. Brown: I have no objection to Mr. Wolf testifying as to those figures. Of course, that appears to be simply an inter-office communication and we would have no knowledge of that, I don't think that we have any objection, however.

The Court: I was just thinking that if there was any objection it should be in the record before this man is allowed to testify about this [108] instrument but inasmuch as you have no objection it may be admitted now. You may proceed, Mr. Donahue.

Q. Now, Mr. Wolf, from Defendant's Exhibit No. 30, will you read the tonnage that was stock-piled from those various mine operations?

A. "Under the subject contract we have stock-piled at the smelter at Silver King, Idaho, the following zinc concentrates: Description, tonnage, approximate weighted average zinc content. Bunker Hill 7,074 SDT". That means standard dry tons, "53.1 per cent. Hecla 911 SDT 51.8 per cent. Spokane 5,571 SDT 40.3 per cent. Star 51,945 SDT 49.5 per cent."

Mr. Brown: What is that per cent that you have read?

Q. That is the weighted average of the zinc content, the zinc content of the concentrate.

A. That is right, the average analysis of the zinc content.

Mr. Brown: And that represents dry tons?

(Testimony of Wallace G. Wolf.)

A. Yes, sir.

Q. And if that was calculated in wet tons, the tonnage there would be greater, would it not?

A. I imagine that the moisture would be about 10 per cent so you would have to increase by that percentage. [109]

Q. It indicates in that, does it not, that out of the 72,263 tons of wet ton concentrates set out in your Exhibit No. 28, that 51,000 plus of concentrates were furnished to the stockpile by the Star Mine?

A. That is correct, with this exception, as has been mentioned here, we had an increased number of shippers; many of those shippers produced small tonnage of concentrates. We were up against the question of bin capacity all the way along because of the shortage of bins and the shortage of labor and so on and also the shortage of lumber to build the bins. So it was our policy to process as many of the small tonnages as we could and to put the tonnage from the major producers into the stockpile. In that way, since we had instructions from the Government to keep the zinc concentrates from each shipper separate and apart, in order to avoid building bins for a lot of small tonnages, we processed the concentrates from as many small producers as we could and we stockpiled shipments from the major producers.

Q. But it still remains a fact that the Star Mine and the Bunker Hill and Sullivan Mine furnished

(Testimony of Wallace G. Wolf.)

well over 55 or 56 thousand tons of the total of 72,000 tons that went into the stockpile? [110]

A. Yes, those percentages of tonnage are approximately correct, I assume, however, I do recall that we limited the stockpile to four producers. That was for the reasons that I have stated.

Q. And one of those very big producers was the Star Mine? A. Yes.

Q. And one of the other big producers was the Bunker Hill and Sullivan Mine? A. Yes.

Q. One of the others was the Hecla?

A. Yes,—however, you notice the amount stored for the Hecla was only 911 tons, that again is because in the case of the concentrates, they were of comparatively low grade and you will recall from previous testimony that we were limited in the amount of low grade material that we could put in the stockpile, that was another reason why we stockpiled the concentrates from the Star and the Bunker Hill and Sullivan, they were of standard grade that the Government would accept for the stockpile.

Q. After contract AA-29 was entered into in 1942, up until the time the stockpile agreement ended in June of 1947 the Star Mine sold practically all of their concentrates or all of them to the Metals Reserve Company and they were stockpiled, and about all that the Sullivan Mining Company smelted on their own account were from the small [111] producers, is that not correct?

A. In addition to the amount of the Star con-

(Testimony of Wallace G. Wolf.)

centrates that we stockpiled, we were also processing a considerable portion of the Star concentrates, because as I explained in previous testimony, we were taking at that time purchasing and treating some of this low grade material and it was necessary to commingle it with the better grade because there was only a limited amount that we could stockpile. I would like to say further that the Star Mine ships us concentrates as do other producers and during this period the material that we placed in storage was simply a matter of the zinc plant's own determination, we did it having in mind metallurgy and the operation of the plant and the bin situation that I have heretofore described.

Q. If that is correct then out of a total of 72,000 tons put into the stockpile for the Metals Reserve Company, 51,000 dry tons of that was produced by the Star Mine and you say there were other Star concentrates on top of that that you processed yourself?

A. That is my recollection.

Q. That being true, there was a very huge tonnage from the Star Mine going either into the stockpile or into the Bunker Hill smelter? [112]

A. The Star Mine is a large producer. I would have to refresh my memory as to their monthly production, but as I recall during that period they also suffered from labor shortage and their production was cut down accordingly, however, they are one of the largest shippers to the Sullivan zinc plant.

(Testimony of Wallace G. Wolf.)

Q. Now, Mr. Wolf, we have a whole series of letters introduced by your attorney and dealing with the extensions and increase of the stockpiling limits, starting back in July, 1942, I believe it is dated July 7, 1942. Calling your attention to a long series of letters exchanged between the Sullivan Mining Company and the Metals Reserve Company,—I call your attention first to Exhibit No. 4, it is a letter dated July 7, 1942, addressed to Mr. Bridgeman from the Sullivan Mining Company?

A. Yes, I have that here, what did you say was the date?

Q. I have on my notes July 7.

A. Yes, I have that.

Q. Down at the bottom of the first page it says: "From the foregoing it appears that while the co-operation of Metals Reserve Company in purchasing 1,500 tons a month is a substantial relief, nevertheless, it is not sufficient to care for the current situation and I respectfully request that the 1,500 tons per month purchased be [113] increased to 2,000 tons per month with a corresponding increase in the total of 10,000 tons now provided for in the agreement."

The Court: Now, Mr. Witness, if you will keep that question in mind we are going to recess at this time until 1:30 and we will adjourn this case until 2:00 o'clock, I have other matters to take up first.

November 3, 1953, 2:00 o'clock, p.m.

Q. Do you have Exhibit No. 4 in your hand, Mr. Wolf?

A. It is here, yes.

(Testimony of Wallace G. Wolf.)

Q. Now then, referring to Exhibit No. 4, a letter dated July 7, 1942. At the bottom of the first page it says: "From the foregoing it appears that while the cooperation of the Metals Reserve Company in purchasing 1,500 tons a month is a substantial relief, nevertheless, it is not sufficient to care for the current situation and I respectfully request that the 1,500 tons per month purchased be increased to 2,000 tons per month with a corresponding increase in the total of 10,000 tons now provided in the agreement." By the way, that letter was signed by Mr. Easton. What did your company, the Sullivan Mining Company refer to when they used the term [114] "substantial relief"?

A. Reference was made to the tonnage that was being stockpiled. In explanation of this I would like to explain how these letters were written. I, as superintendent of the plant, advised my superiors of the tonnage of zinc concentrates that were being received, the tonnage going into the stockpile,—as we approached the limitation I advised them of that fact,—the current tonnage that was being received, it was I that advised them and gave them the estimate of the tonnage that should be increased, and the total that should be asked for and the rate at which it should be done in some instances. You will notice by these exhibits that in some cases the letters are written by Mr. Easton and in some cases by Mr. Hanley and in other cases by Mr. Haffner. This particular letter is written or was written by Mr. Easton and the clause or sentence that you have

(Testimony of Wallace G. Wolf.)

read refers to the fact that our receipts of concentrates in excess of our ability to process were such that we had to have the tonnage of the Metals Reserve concentrates increased,—not only the tonnage but the rate at which they could be stockpiled per month had to be increased, otherwise we would have to refuse some shipments from some producers. We were processing all that we could [115] at the time and we were stockpiling the balance.

Q. It is a fact, from this series of exhibits, this correspondence that every six months approximately, you requested the Metals Reserve Company to increase this stockpile, and that went on continuously throughout that period? A. That is right.

Q. And it finally got up to the point where the Metals Reserve Company had permitted you to stockpile approximately 80,000 tons?

A. I think that was the final figure.

Q. Was it an advantage to the Sullivan Mining Company to have those stockpiles increased?

A. The advantage to the Sullivan Mining Company was nothing unless we were able to process the concentrates. The advantage was to the various shippers who were producing the concentrates. It gave them an outlet for their production, otherwise they would have been shut down.

Q. You were anxious to maintain an outlet for those shippers in that area?

A. In the furtherance of the war effort and because we were informed that every pound of metal

(Testimony of Wallace G. Wolf.)

that could be produced should be produced,—yes, we were anxious to maintain them.

Q. Were you also anxious because of the fact that if you could handle all of those small shippers you could then get [116] full production from the Star Mine and the Bunker Hill Mine and thereby take advantage of these over-quota prices that were being paid?

A. Of course, if those respective companies could produce, presumably they could take advantage of the over-quota price, that was okay, but the main idea that we had in mind in increasing this tonnage was simply to take care of all of the producers. You asked me just before the intermission,—there was an exhibit in which you show the tonnage of the Star Mine, the Bunker Hill and also the Hecla, that had been put into or gone into storage. You asked if it wasn't true that practically all of the production had gone to storage and I was unable at that time to give you those figures. During the intermission I communicated with the office of the zinc plant and got those figures. The concentrates purchased from June, 1942, to November, 1946, inclusive, which was the period of the stockpiling showed that we processed and did not put into the Metals Reserve Company stockpile account 82,898.9225 tons of Star Mine concentrate and 40,132.5970 tons of Bunker Hill concentrate.

Q. I also asked you before the recess if you could tell me whether or not the Star Mine was

(Testimony of Wallace G. Wolf.)

being paid additional payments for over-quota production?

A. And as I recall, I answered that I could not tell you [117] with any assurance. I thought they had a quota but I wasn't able to tell you what it was and I am unable to tell you that now.

Q. Do you know what the quota for the Bunker Hill and Sullivan was? A. No, sir.

Q. Do you know whether it was substantial?

A. No, I don't know just what it was.

Q. I am handing you Defendant's Exhibit No. 31, which is a letter directed to the vice president of the Metals Reserve Company by Sullivan which indicates that the Star Mine, during the last six months of 1943 had an over-quota premium production of 3,478,654 pounds of zinc. This letter is signed by Mr. Easton. I would like to know if you feel that the computation is correct?

A. This letter is signed by Stanly A. Easton, President of the Sullivan Mining Company, and undoubtedly the figures there are correct, if he signed the letter.

Q. Again referring to that exhibit, it totally covers a period of only six months with reference to the Star Mine, would you say that represents an average of over-quota payments during the following several years until the stockpiling agreement was ended?

Mr. Brown: I object to that, if the Court please, only as being improper cross examination, [118] it has not been shown that Mr. Wolf knew, and I

(Testimony of Wallace G. Wolf.)

believe he stated that he had no knowledge of the Bunker Hill and Sullivan.

The Court: I will admit it and permit him to answer subject, of course, to your objection and I will give it the weight and I think it is entitled to.

A. Well, frankly, I am unable to answer your question one way or another because this period in question,—the last six months of 1943, as I stated the production from the Star Mine as well as from other mines was up and down during this time, depending on the labor situation and so I cannot say whether this represents the over-quota figure or not.

Q. But you wouldn't say that it wasn't represented?

A. No, I am unable to answer it either way.

Mr. Donahue: I will offer Exhibit No. 31 in evidence at this time, if the Court please.

The Court: I will admit it subject to the objection that was made a little bit ago.

Q. Do you know when production of concentrates started from the Star Mine?

A. You mean the start of operation of the Star Mine?

Q. Well, I will ask you that question first, yes, if you know?

A. I am unable to give any definite date of production, but [119] the production from the Star Mine started back many years ago.

Q. That is all I wanted to know relative to that

(Testimony of Wallace G. Wolf.)

matter, was the production of the Star Mine substantially increased about 1942,—the output?

A. I am unable to answer that with any definite knowledge. I don't recall any reason why the Star Mine production was or would be increased substantially in 1942.

Q. However, the increase was made, if the premium was paid on over-quota production?

A. Yes, the over-quota production was based on the immediate period immediately preceding, the over-quota production was an increased production.

Q. And if the Star Mine was paid on an over-quota production then there must have been an increase in the output?

A. Yes, that is true.

Q. Mr. Wolf, you are now handed Defendant's Exhibit No. 32 and I will ask you to examine that and when you are through with it I would like to have it? A. Yes.

Q. Defendant's Exhibit No. 32 purports to be the amount of money paid to the Bunker Hill Mining and Concentrating Company for over-quota production at the Bunker Hill Mine from December, 1942, up to September, 1943, and it shows that the Bunker Hill Mining and Concentrating [120] Company was paid \$778,646.16 during that period for over-quota production, would you say that was correct?

Mr. Brown: If the Court please, I am objecting to this question and I move that the statement with respect to what the exhibit shows be stricken on

(Testimony of Wallace G. Wolf.)

the ground on what the production of the Bunker Hill Mine was,—this was not owned by the Sullivan Mining Company,—and it would be immaterial. I cannot see what it has to do with the question of receipt of premium price under the program put out by the Government to pay premium price for the purpose of stimulating the production of lead, zinc and copper,—I fail to see what that has to do with this suit.

The Court: I will admit it, the Court having control of this matter, I think perhaps I should let this evidence in then I can give it the weight I determine it is entitled to receive later.

Q. You have seen the figures, would you say that figure was, in your opinion, correct?

A. I would like to see that exhibit again, I wasn't able to grasp it at a glance. This exhibit shows the production from the Bunker Hill Mining and Concentrating Company, it shows where processed, and shows the other figures, as far as the Bunker Hill and Sullivan Smelter is [121] concerned I am unable to state whether those figures are correct or not, however, the tonnage of zinc shipped to the Sullivan Zinc Plant seems to be in order, yes, sir.

Q. And the amount shown at the end of that report or document, 700 and some odd thousand dollars, would you say that was in order also, for that period?

A. If the lead figures added to the zinc figures are correct, of course, the lead figure is quite a

(Testimony of Wallace G. Wolf.)

substantial one, and if that is correct probably this figure is correct, yes.

Mr. Brown: May I ask a question?

The Court: Yes, you may.

Mr. Brown: I understand that with respect to the production a good deal of that production shown on Exhibit No. 32 is lead production, that is, from the Bunker Hill Mine. Now, did I understand you to say that you had no knowledge of that, the lead production? A. I had no knowledge, none.

Mr. Brown: You did as to the zinc?

A. Yes.

Mr. Brown: I now renew my objection, if the Court please, particularly as to the lead production.

The Court: Yes, it is not to be considered in any matter as to the figure on the lead production. I will admit the other subject to the [122] objection made.

Q. Mr. Wolf, you have been handed Defendant's Exhibit No. 33, which are reports prepared by the Reconstruction Finance Corporation,—I would like to withdraw that, it is the Metals Reserve Company, Washington Office, relative to the total over-quota payments made to the Sullivan Mining Company during the greater portion of the time that the over-quota premium plan was in existence. I want you to review these figures and tell me if you feel those are substantially correct as to the total premiums?

A. I gather from this series of papers that they were the amounts that were forwarded to the Re-

(Testimony of Wallace G. Wolf.)

volving Fund. So far as it concerns the Sullivan Mining Company,—there is also in here in one instance, at any rate, at the top of the page the Bunker Hill Smelter,—now, as to the Bunker Hill Smelter I cannot testify as to whether those figures are substantially correct or not. This Revolving Fund for premiums wasn't handled directly by me, it was handled by our office and I presume that these were correct. I know that the Revolving Fund was increased from time to time as the premium price plan went on.

Q. There is a total of about \$10,000,000 that was paid out in connection with over-quota premium payments, so far as you know that is substantially correct?

A. I see no totals given here,— [123]

Q. —No, you are right, there isn't unless they are added.

A. So I am unable to state whether these are the correct figures or not.

Mr. Brown: Mr. Donahue, does this relate to the funds that were paid or passed through the Sullivan Mining Company hands as agent for the Reconstruction Finance Corporation or the Metals Reserve Company, that were paid to all of the shippers on the premium price plan. Is this an audit of the Revolving Fund that was handled for the Metals Reserve Company?

Mr. Donahue: It is my understanding that it consists entirely of over-quota payments.

Mr. Brown: Over-quota payments to whom?

(Testimony of Wallace G. Wolf.)

Mr. Donahue: To the Sullivan Mining Company who in turn paid the producers.

Mr. Brown: This does not represent the premium payment to the Bunker Hill and Sullivan Mining and Concentrating Company and the Sullivan Mining Company but funds that went through their hands to pay the other shippers.

Mr. Donahue: Their over-quota payments to the other shippers, that is my understanding. [124]

Mr. Brown: We have no objection to the exhibit with that explanation.

The Court: It may be admitted.

Q. You have Exhibit No. 3 which was handed to you, Plaintiff's Exhibit 3, and I am calling your attention to paragraph 2 of Plaintiff's Exhibit No. 3, which is the original contract agreement entered into on June 18, 1942,—that provides in that particular paragraph as follows: "We understand that due to the recent increase in production of zinc concentrates in your district, your existing smelter capacity is inadequate to treat the quantities of material being tendered to you; that you now have on hand your normal emergency reserve of material and do not feel warranted in purchasing for your own account for reserve, any additional material. In order to encourage the continued production of this material in your district, deemed necessary in the war effort, this company will purchase an amount of this material for a period of time, tendered to you in excess of your smelting capacity as hereinafter stated." Now, that sets out

(Testimony of Wallace G. Wolf.)

clearly one of the objectives of this contract. When did you expect to treat these concentrates that were put in originally, because of the fact that your own capacity was inadequate at that time, when did you expect to treat them? [125]

A. Well, that would be a difficult question to answer. We expected to treat this material as soon as we had capacity in the plant to be able to do so. Just when that would be, of course, would be a question of circumstances in the future.

Q. There was no definite understanding by anybody when that time might arrive?

A. No, not at that time, not under that contract at that time.

Q. Turning now to the second page of Plaintiff's Exhibit No. 3, I read you the following language: "You will stockpile, at your expense, such material so purchased on the property of your smelter at Silver King, Idaho." Now, there was no misunderstanding in anybody's mind at that time as to the fact that the Sullivan Mining Company, either to help the war effort or their own production in some manner did absolutely and positively agree to stockpile this material at their own expense?

A. That is true, but at the same time we considered that we were going to process that material.

Q. Now then, going down to the fifth and last paragraph on the second page of that agreement, I will read the following language of this contract:

(Testimony of Wallace G. Wolf.)

"We understand that you desire the material purchased here-under for our account to be sold to you from time to time as you [126] are able to treat same." Now, do you consider that a positive contractual agreement that the Metals Reserve Company had to sell that material to you?

A. I can only tell you my interpretation of that and I certainly understood that from this contract that since we were desirous of purchasing the material that we would treat the concentrates that we stockpiled.

Q. Is there anything in this agreement that says that, that you can find, Mr. Wolf?

A. My understanding of that language is "We understand that you desire the material purchased hereunder for our account to be sold to you from time to time as you are able to treat the same." That is my interpretation just as it says, it was to be sold to us to be treated.

Q. In other words, the Metals Reserve Company knew if you, at some time did become able to treat this material you might desire to purchase it?

A. The understanding was that we were going to treat this material that was being stockpiled.

Q. That is not what the agreement says?

A. Well, it is according to my understanding.

Q. Then you interpret that the Metals Reserve Company, when they state: "We understand that you desire the material purchased hereunder for our account to be sold to you [127] from time to time as you are able to treat same." You consider

(Testimony of Wallace G. Wolf.)

that a bonafide absolute contractual agreement to sell all of the stockpile to your company?

A. I can only answer that in the terms of my understanding at the time that it was entered into and my understanding was that the material purchased was to be treated by us.

Q. Now, turning to Exhibit A which is attached to that contract, and which is the last page, that is a storage and ownership certificate, is it not?

A. Yes.

Q. Of the Sullivan Mining Company? A. Yes.

Q. That is the method by which the concentrates were to be given over or held by the Sullivan Mining Company,—it is an ownership contract or certification? A. Yes.

Q. Now, this certificate, Exhibit A, provides and I am quoting: "The undersigned company hereby certifies that it has received and holds in storage on stockpile at its Silver King plant, Silver King, Idaho, for Metals Reserve Company, Washington, D. C., or order (blank) short tons of zinc concentrates described as follows, and that said zinc concentrates are owned by Metals Reserve Company or the holder hereof and will be released and delivered to the holder hereof upon surrender of this certificate properly [128] endorsed." Now, what was your understanding of what that Exhibit A meant?

A. My understanding of it was by these storage ownership certificates we described the concentrates, the quantity and these specific concentrates and that they were owned by the Metals Reserve Company

(Testimony of Wallace G. Wolf.)

and were and would be in the sole possession of the Metals Reserve Company and that we were responsible to see that they were kept intact so that we could account to the Metals Reserve Company for the concentrates.

Q. And what interpretation do you put on the words "and will be released and delivered to the holder hereof upon surrender of this certificate properly endorsed"?

A. I must say that at the time we entered into the stockpiling I didn't pay too much attention to the legal aspects of this matter and of the last three lines indicated, I understood, however, that these concentrates were the property of the Government and that we had to hold the property intact for the Government and take care of it and account for it.

Q. Mr. Wolf, this is a part of the contract and you agreed to release and deliver these concentrates to the holder of this certificate. If you agreed to that how did you expect to process these concentrates at some unknown future date? [129]

A. May I say that when we entered into this contract we didn't give this contract to any attorney to examine as to the legal phrases, we were dealing with men that my superiors were well familiar with and acquainted with and men who were outstanding in the mining industry and with my acquaintance of mining I understood that they were outstanding men, as far as I was concerned this was an emergency situation of the war and the Government wanted us to aid them in getting out more

(Testimony of Wallace G. Wolf.)

metal. That was the thing that we undertook here, to stockpile concentrates under the premium price plan and we went ahead and did it. To my knowledge this contract, at the time that it was signed was never turned over to any attorney for careful scrutiny as to its legal aspects or phrases contained in it.

Q. Then, as I understand your testimony, Mr. Wolf, you have tried to leave the impression that the Metals Reserve Company under the original contract in 1942, had no right whatsoever to remove these concentrates. From the wording of Exhibit A in the contract, will you now admit that interpretation is wrong?

Mr. Brown: Just a moment, I want to object to that, it is argumentative, Mr. Wolf has made the explanation of every point here as fast as he could [130] and as well as he could. I have refrained from making too many objections, however, I think this is improper cross examination and it is argumentative. I believe that your Honor will interpret the contract.

The Court: I will let him answer and I will consider your objection later, Mr. Brown.

A. Well, I am not an attorney and I am unable to give an opinion as to what that means. I will say this, my understanding of this when I read it and I didn't pay too much attention to the details, my understanding was that by this certificate we identified certain stockpiles of concentrates and when those concentrates were to be processed we

(Testimony of Wallace G. Wolf.)

delivered this certificate in order to properly account for the concentrates, to the Government.

Q. The certificate was held by the Metals Reserve, was it not?

A. Yes, it was held by them to identify the concentrates which we were holding for their account.

Q. And the certificate provided that they would be released by you to anybody holding the certificate?

A. I had in mind that they would be released to us for processing and that we would account for them as they were released to us.

Q. I understand that is what you had in mind at that time [131] but that apparently is not the fact of this contract.

Mr. Horning: Now, if the Court please, that is certainly argumentative.

Mr. Donahue: Perhaps so, I will not pursue that any further.

Q. Now, Mr. Wolf, calling your attention to Plaintiff's Exhibit No. 6 which you have in your hand, and which is dated July 12, 1944, that is the contract or rather the amendments to the original contract, is that what that is? A. Yes.

Q. Now, in a general way, what was the purpose of this amendment?

A. Do you wish my thoughts at the time the amendment was received by me?

Q. Yes.

A. Well, we were informed by previous correspondence that the original contract was one of the

(Testimony of Wallace G. Wolf.)

earliest ones that had been signed. As a result of that it wasn't in conformity with later contracts and the Metals Reserve Company wanted to bring it in to conformity with other contracts with other companies. Here again when this contract was received by me I viewed it in the light of those facts and I didn't pay too much attention to the legal features. This amendment was never submitted [132] to any attorney for any legal scrutiny again, and as far as I was concerned it was to do just what they requested, to bring it in conformity with other contracts and as such it was okay with me.

Q. There has been some testimony here by yourself, that the Sullivan Mining Company was absorbing most of the low grade zinc concentrates, and that the Metals Reserve Company was getting advantage of having higher grade stockpiled in their stockpiles. I think you made reference to some 80 or 85 per cent of the low grade which you stated was held to your account and only 15 by the Metals Reserve Company, is that correct?

A. I think that was stated in our discussion with the Metals Reserve Company when this question of receipts by us of sub par zinc concentrates was discussed.

Q. And that was discussed in answer to a question by Mr. Brown, that is, testimony along that line was given?

A. Yes, I think so.

Q. The amendment of July 12, 1944, Plaintiff's Exhibit No. 6, paragraph 4 of that Exhibit provides: "It is expressly agreed that at no time shall

(Testimony of Wallace G. Wolf.)

the proportion of low grade material, that is, material containing less than 47 per cent zinc, purchased and stockpiled for our account exceed, with relation to the total [133] tonnage contained in our stockpile, the proportion of such low grade material contained in the total tonnage constituting the stockpile maintained for your own account at your Silver King smelter. In other words, both you and ourselves shall maintain, giving due effect to the aggregate quantities stockpiled for our respective accounts, the same proportionate amount in stockpile of such low grade material." That was one of the purposes of entering into this amendment, it was to work out that low grade proposition, was it not?

A. It came in, incidental to the amendment, yes, sir.

Q. That, along with Plaintiff's Exhibit 8 which was a letter dated July 20,—I guess that was Exhibit 7,—which was a few days subsequent to this, that fixed up the situation so that no one was to get any the worse of the low grade part of the stockpile, wasn't that correct?

A. The situation actually gave the zinc plant the worse of the low grade situation because we were processing the majority of the low grade material and stocking the higher grade for the Metals Reserve Company. So far as the economic outcome to the zinc plant was concerned, because of the difficulty in processing and the metalurgy of treating lower grade material,—the cost of treating low

(Testimony of Wallace G. Wolf.)

grade material and the recovery of metal from the low [134] grade material is, of course, lower than from high grade material and the zinc plant was suffering. As I stated in earlier testimony, we were processing this low grade material because of the concentrate situation,—because of the stockpile situation and we were endeavoring to do the job for the war effort. That was my contribution as superintendent of the zinc plant to help with the war effort, that is the reason I did it. It made the operation at the zinc plant very much more difficult because of the excessive amount of low grade material we were putting through.

Q. What do you call low grade material, what percentage?

A. That material that was coming from the Pine Creek area, from the Spokane-Idaho, which contained 35 to 37 per cent zinc and up to 20 per cent lead, 15 per cent iron and was high in insoluble. That was difficult to process in the electrolytic zinc plant.

Q. There was no reason why you couldn't have a proportionate share of this low grade material into the Metals Reserve stockpile?

A. They only permitted a certain percentage, that was the difficulty, they told us there was a limitation of the amount they would accept for stockpiling.

Q. You didn't have to buy this low grade material? [135]

A. We could have shut down the producers that

(Testimony of Wallace G. Wolf.)

were producing this low grade material but I for one didn't want to do that.

The Court: At this time we will recess for 15 minutes.

November 3, 1953, 3:15 o'clock p.m.

Q. I believe you have Plaintiff's Exhibit No. 9. Do you see a letter there dated August 13, 1946, to the Sullivan Mining Company from the Metals Reserve Company? A. Yes.

Q. Now then, calling your attention to the third paragraph of that letter, it starts, and I am quoting: "Up to the present time approximately 60,000 tons of concentrates have been stockpiled for our account, but so far no withdrawal of concentrates for treatment has been made. We now consider it appropriate to convert our concentrates into zinc metal and would appreciate your informing us as to whether you are able to begin treatment of such concentrates at your plant for our account. Please advise us as soon as possible what monthly tonnage you can treat and on what terms." It is a fact, is it not, that after you received that communication from the Metals Reserve Company you analyzed the situation and knew that you could not possibly treat any concentrates at that [136] time?

A. That is true, the reply mentioned that we were able to operate only two of our three electrolytic cell units because of lack of adequate labor, and we go on to state in that letter: "Excess concentrates receipts above the tonnage possible to

(Testimony of Wallace G. Wolf.)

process is continuing as a result thereof." We went on and mentioned that with the beginning of the Fall when labor would come in from the woods and the farm work that we hoped to be in a better position.

Q. This was the first request or the first time that there was a direct request by the Metals Reserve Company that you start treating the concentrates?

A. Yes, as I recall, that was the first request.

Q. Do you have a letter there dated August 20, 1946, from the Sullivan Mining Company to the Metals Reserve Company? A. Yes.

Q. Quoting from that letter, on the second page: "Whether or not we shall then be able, at maximum plant capacity, to begin treatment of zinc concentrates stored for your account is depended upon the tonnage of concentrates tendered to us currently for purchase since it is very probable that such tonnage will be increased by reason of greater labor supply becoming likewise available to [137] the mines in this district who are now, like ourselves, seriously undermanned." Now, it is a fact, isn't it, that if the labor situation had improved the output of metal from other mines would increase and the stockpile would become larger because of better labor condition even because of better labor market you are able to run your plant at full capacity, in other words, your concentrates would increase in amount and one would practically offset the other, is not that right?

(Testimony of Wallace G. Wolf.)

A. That is true, as labor became available more men would be employed at the mines and the production would increase from the mines and we would no doubt get increased tonnage at the plant.

Q. In the last paragraph of that letter, and I am quoting: "In this connection we are unable to determine from your letter of August 13, 1946, if you desire for us to process the concentrates stored for your account on a toll basis returning to you the zinc metal resulting from the processing or if you desire us to purchase such material on the same basis as all our other zinc concentrate receipts, the resulting metal therefrom being retained and sold by us for our own account. We will appreciate your advice in this respect." In answer to that letter,—I am not referring to any exhibit now,—however, it is a fact that the Metals Reserve Company [138] indicated that they would be perfectly willing to have the concentrates handled on a toll basis, if you were able to do that, is that true?

A. This letter was written by Mr. Haffner and my recollection right now,—well, I don't remember this question of toll treatement having been brought up at all.

Q. That arrangement would have been perfectly satisfactory if you had the ability to treat them at all, to process them?

A. Yes, I think so, if the Government had wished us to return the metal to them for their purposes I believe that we would have been perfectly willing to do it.

(Testimony of Wallace G. Wolf.)

Q. Calling your attention to Exhibit No. 11, there is a letter there from the Sullivan Mining Company which is signed by yourself, to the Metals Reserve? A. Yes.

Q. Calling your attention to the last paragraph of that letter you state: "When the subject agreement was entered into it was contemplated that the stockpiled concentrates would eventually be processed in our plant, which would derive the benefits accruing therefrom including processing margin. Since the stockpiled concentrates are now to be shipped elsewhere we contend that we should be reimbursed for the substantial out-of-pocket expenses of this stockpiling and we trust that [139] you will take appropriate action that we may receive equitable consideration under these circumstances." That is a letter which you sent to the Metals Reserve Company? A. Yes.

Q. And that was quoting directly from that letter? A. Yes.

Q. Now, Mr. Wolf, do you have any explanation as to why, if you were depending on the amendment of the contract of 1944 for reimbursement,—can you tell me why you didn't refer to the amended contract instead of asking for equitable consideration,—you are familiar with the amendment, are you not?

A. I am, but by the original contract and the amendment I always understood that it was contemplated that we were to purchase the concentrates and to process the stockpiled concentrates, and if

(Testimony of Wallace G. Wolf.)

we were to process those concentrates we would have been willing to absorb all of the cost of the stockpiling because of the profit resulting from the processing of those concentrates, but when they came to be removed elsewhere then it became a question of out-of-pocket expenses of stockpiling the concentrates for the Government and I thought that we should receive some reimbursement for that.

Q. I understand that but according to what I observe, in [140] this complaint which you filed against the Reconstruction Finance Corporation, you are depending for your reimbursement, to a considerable extent, upon paragraph two of the amendment to the contract which provides: "If this company should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply." I am wondering why, when you wrote this letter, you didn't refer to that paragraph of the amended contract if you were depending on that for your right to receive payment?

A. In reply to that I might state again that I am not an attorney. I had in mind and thought that the amendment or the amended contract called for our reimbursement of out-of-pocket expenses if the concentrates were to be removed and not processed by us.

Q. Then why in this letter of March 11, 1948,

(Testimony of Wallace G. Wolf.)

which is Exhibit No. 11, did you use the language, and I am quoting: "We trust that you will take appropriate action that we may receive equitable consideration under the circumstances"?

A. In writing that letter I was pointing out that the [141] concentrates, which I had always thought were to be processed by us, was to be shipped elsewhere and I was calling their attention to the fact that I thought we should receive our out-of-pocket expenses. I called that to their attention.

Q. Then you were not depending, at that time, upon the amendment to the contract for payment?

A. I don't know just what you mean by that.

Q. You felt that you had payment coming?

A. Yes.

Q. Because these concentrates were going to be removed some place else, that is correct, is it?

A. Yes.

Q. The original contract agreement provided that the stockpile should be maintained at no cost to the Metals Reserve Company, is that right?

A. Yes, with the understanding that we were to process the concentrates.

Q. Is there anything in the original contract that gives you the right to process the concentrates, the exclusive right?

A. I don't know about the language but so far as I was concerned the intent was for us to process the concentrates.

Q. Well, we have discussed that and I don't think there [142] is any use of arguing any fur-

(Testimony of Wallace G. Wolf.)

ther, but apparently when you wrote this letter of March 11 you had forgotten about the amendment to this contract and you were not depending on it at all?

A. The amendment to the contract as I interpreted it gave us the right to out-of-pocket expenses if the concentrates were removed elsewhere for processing.

Q. And with that understanding, you completely failed to recognize that amendment or to make any reference to it when you made your first request for payment?

A. In this letter I was calling this to their attention and, as I say, not being a lawyer, that is the best that I did.

Q. But you could have called to the attention of the Metals Reserve Company the amended contract just as easily?

Mr. Brown: Now, we object to that again as argumentative.

Mr. Donahue: I will withdraw the question.

The Court: It seems most of this examination is argumentative.

Q. I want to call your attention to a letter dated May 10, and designated as Plaintiff's Exhibit 13,—that is [143] May 10, 1948, and I am quoting from the last paragraph of that letter: "This company entered into the stockpile agreement AA-29 as a wartime action because of considerations of national security and with every supposition and belief that the stockpiled zinc concentrates would be processed

(Testimony of Wallace G. Wolf.)

eventually at this plant. This is stressed and emphasized in the first paragraph of your letter quoted above. We consider, therefore, now that those concentrates are to be shipped elsewhere, that your decision above quoted is inexcusably arbitrary and high-handed and a gratuitous imposition on the company's cooperation that prevailed during the time of national crisis, and we believe that the Reconstruction Finance Corporation, as a responsible governmental agency, cannot hold itself aloof from that aspect of the matter but should reimburse this company for expense incurred in stockpiling. We believe that the matter deserves a more realistic attitude, one that is fair and equitable, and we hope that your decision may be reconsidered accordingly." When you wrote or put that language into this letter, was there any reason why, if you were depending on the amendment of July of 1944 for payment, why you couldn't have referred to it?

A. The same answer that I gave to previous questions can be given here. That was a fair statement of my position [144] and what I thought about the thing. I never referred to the particular amendment because I thought that the original contract and the amendment gave us the right to stockpile the concentrates and if the concentrates were to be removed we were to be reimbursed for our out-of-pocket expenses. We stockpiled those concentrates and we were under considerable expense. From my standpoint I did not see what the zinc plant gained if the concentrates were to be

(Testimony of Wallace G. Wolf.)

shipped elsewhere and we were to be out-of-pocket for all of the expenses that we had undergone in the stockpiling.

Q. But you could have very easily referred to paragraph two of the amended contract if that is what you were basing the right of payment on?

Mr. Horning: Now, we object to that again as argumentative,——

Mr. Donahue: ——I will withdraw the question.

Mr. Horning: ——He is asking why he, a laymen, didn't do what a lawyer might have done.

The Court: He has withdrawn the question, go ahead.

Q. Now, calling your attention to Plaintiff's Exhibit No. 16, which is a letter dated July 15, 1948, from the Sullivan Mining Company to the Metals Reserve Company, [145] and I am referring to the last page of that exhibit which is a statement for maintenance of zinc concentrate storage bins, June, 1942, through November, 1946. That statement indicates that the total tons stored for Metals Reserve was 65,501.2630 tons, that is correct, is it?

A. Yes, I think so, that was compiled and I think it is a correct statement.

Q. And at that time you were willing to settle this entire situation for that amount, that is, the amount shown, \$27,310.29?

A. No, this was in answer to a letter which they advised us,—they stated that they would give consideration to certain repairs to the stockpiles and the question of preserving the material. This state-

(Testimony of Wallace G. Wolf.)

ment was gotten out, it was prepared and given to them to show what the cost of the stockpile bins and maintenance of the bins themselves was, and it was not the entire figure because in the smelter cost there is no cost for crane service for loading and unloading the concentrates, it was simply to show what the actual cost of the bins was.

Q. Did you consider this an offer settling this matter, an offer to the Metals Reserve Company?

A. No, this was simply showing them what the cost of the bins was and it was in answer to their inquiry, it was informative and it was not a bill tendered to them. [146]

Q. That is what I want to know. When did you first tender a bill to the Reconstruction Finance Corporation for your claim concerning the input and the output?

A. I am not able to answer that question, that was in the hands of my superiors and I do not know.

Q. Do you know whether Reconstruction Finance Corporation was ever tendered a bill?

A. Yes.

Q. Do you know the amount of it?

A. Well, I do know that Mr. Haffner and I and Mr. Ince in February of 1950 went to Washington and discussed with the Bureau of Federal Supply and discussed with the Reconstruction Finance Corporation this question of the amount of our cost and at that time to both of those agencies we discussed the amount of our bill, yes.

(Testimony of Wallace G. Wolf.)

Mr. Donahue: If the Court please, I have an explanation to make in connection with a proposed exhibit. The exhibit consists of the making of a claim for reimbursement to the Reconstruction Finance Corporation for the establishment and the maintaining of these stockpiles. The letter is dated in February, 1951, and is in a letter which came from a law office in Washington, D. C. There are letters from Mr. Haffner, Mr. Easton and numerous other parties which go no further than to give their opinion of what [147] they thought they should receive. The only purpose is to show that a claim was presented to the RFC on this date and I am asking the Court to permit me to offer the first page of that letter which is the claim itself and the amount which is an exhibit signed by Mr. Wolf at the end of it and leave out the rest which is a letter signed by the attorney in Washington.

Mr. Horning: I don't think that a portion of a letter, with some unknown part omitted, should be offered. I think that if the rest of the letter was shown or the rest of the exhibit it would appear that this was a matter that was attempted at that time to be compromised. I don't believe that it would be proper if a compromise offer had been made and the parties had not gotten together,—

The Court: —I think possibly Mr. Donahue would let you look at the balance of the correspondence there and that may make some difference.

Mr. Brown: May we have a little time to look at this, it is quite lengthy.

(Testimony of Wallace G. Wolf.)

The Court: It may be that we could hold this in abeyance until morning and go ahead with some other phase of the matter.

Mr. Brown: If that could be done then we could look this over during the evening. [148]

The Court: Very well, could you go ahead, Mr. Donahue?

Mr. Donahue: Yes, I can.

Q. You don't recall, do you, when any bill was presented to the Reconstruction Finance Corporation with reference to this?

A. I don't recall the date when a bill was presented to them. I do recall that the question of the amounts was discussed on February 17, 1950, in the office of the Reconstruction Finance Corporation and the Bureau of Federal Supply.

Q. You were not present?

A. Yes, I was present.

Q. At that time isn't it a fact that you made a claim against the Reconstruction Finance Corporation for the stockpiling of 19,224 tons of wet concentrate at a cost of \$14,595.39. If you are not familiar with these figures I don't want you to answer, but if that is approximately correct we can save a little time.

A. That is correct, at the time of this session in Washington, the Bureau of Federal Supply said that for their portion they were willing to agree to the bill that was tendered to them,—the amount that we discussed, there was no formal bill tendered. They asked me to prepare a statement show-

(Testimony of Wallace G. Wolf.)

ing the cost and [149] I said that I would prepare such a statement on my return to the plant, which I did and sent to them. Following that we went to the Reconstruction Finance Corporation office and there we were rebuffed for their portion and were told that they would not pay.

Q. At no time did you present a bill or make a demand upon the Reconstruction Finance Corporation for the total amount of \$54,864.10 that you allege is due, in your complaint, is that correct?

A. No. I don't think that is correct because our claim was for the entire amount of the bill and it was just a question as to what agency of the Government should pay or should they pay proportionate parts.

Q. From your best recollection, is it not a fact that at all times previous to the time that you started your lawsuit, you only called on the Reconstruction Finance Corporation to pay approximately \$14,000.00 and you were requesting the Bureau of Federal Supply to pay the balance of \$54,000.00?

A. My recollection was that the matter of the payment in the earlier portion, that is, prior to the time the Bureau of Federal Supply took over was in dispute between two Bureaus and until that dispute was settled, as far as I was concerned, I did not know which branch of the Government would pay what, but the total amount of the [150] bill was discussed with them.

Q. Mr. Wolf, are you familiar with this assign-

(Testimony of Wallace G. Wolf.)

ment made from the Reconstruction Finance Corporation to the Bureau of Federal Supply, Treasury Department, which has been introduced as Exhibit No. 22?

A. Yes, I recall we received such an assignment.

Q. Did you ever give it any particular consideration?

A. The consideration that I gave it, from a personal standpoint, was the fact that the stockpiled concentrates were to be assigned from one branch of the Government to another. I acknowledged receipt of the assignment on that basis.

Q. You did acknowledge receipt of the assignment?

A. Yes.

Q. Calling your attention to Plaintiff's Exhibit No. 18, which is a letter dated November 9, 1948, directed to the Sullivan Mining Company by Mr. T. J. Doherty, and I am quoting from paragraph No. 2 of that letter: "Accordingly, you are requested to accept this letter as a release of all material remaining in stockpile to Treasury Department, Bureau of Federal Supply, effective as of the close of business November 30, 1948. In accordance with the above, all charges incurred in connection with this material will be for the account of and you will bill such charges to the Bureau of Federal Supply, effective as of December 1, 1948. [151] Our legal division is arranging to assign the underlying contract involved in this storage operation." You are familiar with that letter and approved it on behalf of the Sullivan Mining Company?

(Testimony of Wallace G. Wolf.)

A. I don't see any approval.

Q. Isn't there an approval in the left-hand corner of the second page on the bottom?

A. Not in this, no.

Q. I call your attention to the last paragraph of that letter: "We ask that you indicate your understanding and acceptance of the above by signing and returning the attached copy of this letter." Do you see that?

A. Yes.

Q. And your signature appears on the left-hand side where you acknowledge it?

A. It is not here.

Mr. Donahue: May I approach the witness?

The Court: Yes, you may.

Q. I will ask you,—by way of explanation I will state that I have a photostatic copy of this letter which was apparently prepared after your acceptance of it,—to shorten this up, do you recall that you agreed to this by signing your name to it?

A. No, my recollection is that this letter coming with the assignment, I simply acknowledged receipt of it. There [152] may have been something subsequent but I don't recall it.

Q. Mr. Wolf, Defendant's Exhibit No. 35 has been handed to you, now, if you will turn to the second page I will ask you whether that does not state: "We ask that you indicate your understanding and acceptance of the above by signing and returning the attached copy of this letter", and whether that is a photostatic copy of your signature at the bottom?

A. Yes, it is.

(Testimony of Wallace G. Wolf.)

Mr. Donahue: I offer this in evidence.

Mr. Brown: We have no objection.

The Court: It may be admitted.

Q. By the way, Mr. Wolf, what has been done with those bins up at the Sullivan Mining Company since the stockpiling agreement ended June, 1947?

A. Some of the bins have been used for stockpiling zinc concentrates, that I know of. We have had, since that time a maximum storage of concentrates in tonnage of some 12,000 tons. I do not know whether the Bunker Hill smelter has used some of their bins, but I imagine that some of the earlier bins used originally by the Bunker Hill Smelter are not being used by them, however, I am not sure of that. The remaining of the bins, the larger bins, are just standing there. [153]

Q. Are they being used at all at the present time,—what you call the remaining bins, do you use them off and on?

A. Just a few of those bins, the maximum concentrates in tonnage, as I recall, that we have had in bins, in stockpile, on the Bunker Hill smelter ground, is about 12,000 tons and to that extent we have used some of the bins that we used before to store the concentrates for the Metals Reserve Company and the Sullivan Mining Company concentrates.

Q. In other words, these bins are still of considerable use to your company, is that correct?

A. No, I would not say so because here is what happened, those bins were built by laying wood fills on the ground and then laying a plank floor and

(Testimony of Wallace G. Wolf.)

then the bins were separated by partitions and when the bins are empty and stand in the summer sun the boards warp and crack and if the bins were to be used again much of the lumber would have to be replaced because of the warping and the drying out and the checking of the lumber.

Mr. Donahue: I think that is all.

The Court: Do you have any redirect?

Mr. Brown: Yes, we do.

The Court: Then you may proceed. [154]

Redirect Examination

Q. (By Mr. Brown): Mr. Wolf, you may have given this information but I am not sure. There was considerable questioning of you concerning the fact that concentrates from the Sullivan Mining Company's Star Mine went into the Government stockpile, was there any benefit to your company in placing those concentrates into the Government stockpile?

A. None whatever, particularly because we never processed them. The advantage to the zinc plant is in processing high grade material and we consider concentrates from the Star Mine to be **high grade** material.

Q. Did you ever receive any objection from the Metals Reserve Company or the Reconstruction Finance Corporation as to the quantity of concentrates from the Star Mine placed in the Government stockpile? A. No.

Q. Exhibit No. 33, as I understand it, sets forth

(Testimony of Wallace G. Wolf.)

the premiums that were handled by you as agent for the Metals Reserve Company in a Revolving Fund. What is the fact as to whether or not all of the domestic producers of zinc concentrates who were shipping to you, were receiving premium price payments on their concentrates?

A. Yes, to my recollection they were all receiving premium [155] prices on the quotas they had.

Q. In other words, the Sullivan Mining Company wasn't in any different category than other shippers shipping to your plant so far as premium prices were concerned?

A. If you mean by the Sullivan Mining Company, the Star Mine, it was in exactly the same category as other shippers.

Q. Exhibit No. 6, which is the modification of the original agreement, Exhibit No. 6 being the Government letter of July 12, 1944, to you, as a modification of the contract. Prior to the modification letter of July 12, 1944, Exhibit No. 6, had you ever had any notice from the Metals Reserve Company or the Reconstruction Finance Corporation that they proposed to remove any concentrates from that stockpile?

A. No.

Q. Was that the first indication,—the modification of the contract, was it the first indication that you had that concentrates might be removed from the stockpile?

A. That is true.

Q. You have been handed Exhibit No. 13. You were examined at some length concerning Exhibit No. 13 and the fact that in that letter you did not

(Testimony of Wallace G. Wolf.)

make specific reference to the contract and asked for equitable consideration and refer to the arbitrary decision of the Reconstruction Finance Corporation. I will ask you, and I refer to [156] Exhibit No. 12, if your letter, Exhibit No. 13, was in response to a letter from the Reconstruction Finance Corporation dated April 26, 1948, Plaintiff's Exhibit No. 12, in which the following statement appears: "By amendment, it was provided that smelters where such stockpiles existed would be reimbursed for actual out-of-pocket cost incurred in connection with removing tonnage from stockpile for any purpose other than sale to the smelter at which the stockpile was located. In view of this we do not believe we should be called upon to pay any expense for establishing the stockpile or for unloading materials into the stockpile." Was your letter, Plaintiff's Exhibit No. 13, in response to that ruling?

A. Yes, because in my letter of May 10, I refer to that letter of April 26.

Q. Mr. Wolf, I refer to Exhibit No. 16 which I have in my hand and which I will show you later,—Mr. Donahue asked you particularly with respect to that and to the fact that the breakdown of costs show tons storage for the Metals Reserve Company at 65,000 and some odd tons. I will ask you if that was the amount stockpiled to Reconstruction Finance Corporation and to which I believe you replied "yes". Now, are those dry tons or wet tons? A. Those are dry tons. [157]

(Testimony of Wallace G. Wolf.)

The Court: I will adjourn at this time until 10:00 o'clock tomorrow morning.

November 4, 1953, 10:00 o'clock a.m.

Mr. Brown: Counsel yesterday tendered an exhibit to which we objected. We will withdraw that objection if the entire exhibit goes in. We do not think that part of the exhibit should go in, however.

Mr. Donahue: May it please the Court; the portion of the exhibit that I want to introduce consists only of a letter dated February 13, 1951, directed to the Reconstruction Finance Corporation in which the Sullivan Mining Company make a demand or tender a bill to the Reconstruction Finance Corporation for \$14,000.00. Immediately following the first page of this tender they attach a breakdown showing the proportionate share due from the Reconstruction Finance Corporation as they claim, which makes up this \$14,000.00 claim. That statement or breakdown is signed by Mr. Wolf, and this demand for payment on the Reconstruction Finance Corporation is made by the law firm of Shinn, Grimes, Harlan, Strong and Carson, who counsel will admit, I am sure, are the duly authorized representatives of the Sullivan Mining Company at Washington. This letter is signed [158] by Mr. Harlan, one of the members of the law firm. In connection with presenting this claim Mr. Harlan writes what is practically a brief covering the entire situation, in fact, he includes in this letter excerpts from many of the exhibits admitted here

(Testimony of Wallace G. Wolf.)

in evidence, but on top of that Mr. Harlan in presenting this claim has included in it a letter from Mr. Eastman in which he gives his opinion as to what the parties understood, which I think is entirely self serving and would be inadmissible in evidence. He includes in this claim a letter from Mr. Hanley in which he gives his opinion as to the interpretation of the contract and that, again, is self serving and opinion evidence and is something that should be left to the discretion of the Court. He includes a letter from Mr. Haffner in which he gives an opinion as to what the interpretation of the contract should be and that is purely self serving. He also includes a letter from Mr. Wolf and in that Mr. Wolf goes into great detail as to what his opinion is and it is entirely self serving, and then to end it up before we get to the signature Mr. Harlan gives his opinion as a lawyer, and that again is entirely self serving and is inadmissible as evidence. I am going to hand to your Honor this claim which is made up in detail and of which I desire only to have introduced the first page and the breakdown of the [159] amounts. I have those prepared which I think is the only thing admissible in this case. I have these by way of a photostatic copy and I am asking your Honor to admit only three pages of photostatic copy or to admit the first three pages of this voluminous claim and to eliminate the rest from your Honor's consideration. I would like to hand them to your Honor for your examination and consideration.

(Testimony of Wallace G. Wolf.)

will be for the account of and you will bill such charges to the Bureau of Federal Supply effective as of December 1, 1948. Our Legal Division is arranging to assign the underlying contract involved in this storage operation."

Q. After December 1, 1948, did you incur any charges in connection with the stockpile?

A. No, we did not. [162]

Q. You received the assignment mentioned there and which has been admitted in evidence?

A. Yes, we did.

Q. Were you ever requested by the RFC to approve that assignment? A. We were not.

Q. Did you ever approve that assignment?

A. No.

Mr. Brown: I think that is all.

Recross Examination

Q. (By Mr. Donahue): You have been handed Plaintiff's Exhibit No. 22, will you state what that is?

A. This is a letter under date of December 21, 1948, from the Reconstruction Finance Corporation office of War Activity Liquidation, and it is addressed to the Sullivan Mining Company——

Q. ——Excuse me, is that Exhibit No. 22?

A. Yes.

Q. Is there more than one in that exhibit?

A. Yes. There is a letter from the Reconstruction Finance Corporation and my reply.

Q. Will you tell me what both of them are?

(Testimony of Wallace G. Wolf.)

A. The letter from the Reconstruction Finance Corporation says: "Enclosed herewith please find counterpart of [163] assignment executed as of November 30, 1948, by Reconstruction Finance Corporation and accepted and agreed to under date of December 1, 1948, by United States of America, Treasury Department, Bureau of Federal Supply. You will note the assignment covers the captioned contract, as amended, between Metals Reserve Company and yourselves. Please acknowledge receipt of this instrument which you may retain in your files. As you have been heretofore informed by us, the assignment was made in connection with the transfer to the Bureau of Federal Supply of certain material held in storage by you under said contract." That is signed by T. J. Doherty. My reply is under date December 27, 1948, addressed to the Reconstruction Finance Corporation and states: "Receipt is hereby acknowledged of your letter of December 21, 1948, with enclosures of counterpart of the assignment executed as of November 30, 1948, by Reconstruction Finance Corporation and accepted and agreed to under date of December 1, 1948, by United States of America, Treasury Department, Bureau of Federal Supply, said assignment covering the captioned contract, as amended, between Metals Reserve Company and Sullivan Mining Company."

Q. Now, previous to the time you wrote that letter you had received either one or more communications from the [164] Reconstruction Finance

(Testimony of Wallace G. Wolf.)

Corporation that this assignment was being prepared and would be mailed to you?

A. That is correct.

Q. After you received this assignment in your office and wrote this letter which is a part of Exhibit No. 22, did you ever in any way or in any manner or at any time object in any way to that assignment being made to the Treasury Department, Bureau of Federal Supply?

A. I did not, I simply thought that it was a part of the official documents necessary for this physical transfer of this stockpile from one agency of the Government to another.

Q. As a matter of fact, after this assignment was made in December of 1948 you had numerous dealings with the Bureau of Federal Supply, Treasury Department, relative to the stockpile, did you not?

A. Yes, we did.

Q. As a matter of fact, Mr. Wolf, in the month of February, 1951, you went to Washington, D. C., and went to the Bureau of Federal Supply, Treasury Department, with reference to your claim, before you ever went to the Reconstruction Finance Corporation?

A. That is correct.

Q. And you made demand at that time upon the Bureau of Federal Supply, Treasury Department, for payment of approximately \$40,000.00 of the claim that you now [165] set up in this suit?

A. Yes, sir, with the understanding—

Mr. Donahue: You may answer that yes or no.

(Testimony of Wallace G. Wolf.)

Mr. Horning: I think you should let him explain his answer.

A. With the understanding that——

Mr. Donahue: ——I want a yes or no answer unless the Court rules otherwise.

The Court: I will let him answer yes or no and then he may explain his answer, I believe he has already answered yes.

A. With the understanding that we were going to the Reconstruction Finance Corporation and discuss with them the question of payment for this stockpiling.

Q. As a matter of fact, when you went to see the Reconstruction Finance Corporation after you saw the Bureau of Federal Supply you only made demand on the Reconstruction Finance Corporation for payment in the amount of \$14,595.39, is that not correct?

A. Yes, because we had received information from the——

Q. ——Will you answer that yes or no, that is the only demand made on the RFC, is that right?

A. Yes.

Mr. Brown: The witness has answered [166] yes, now may he explain?

Mr. Donahue: Okay, let him go ahead.

A. We informed them that the Bureau of Federal Supply had been willing to pay a part of this claim and we then went to the Reconstruction Finance Corporation to see if they would not also be willing to pay.

(Testimony of Wallace G. Wolf.)

Q. When you say a part of the claim, I am now calling your attention to paragraph 8 of your complaint and it reads as follows: "That between August 9, 1944, the date of this contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons on said zinc concentrates stockpiled by the plaintiff upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$14,595.39 and subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$40,268.71." Those are the allegations or rather that is an allegation of your complaint and I am now asking you if it is not a fact that the demand you made upon the Bureau of Federal Supply, Treasury Department, was for this \$40,268.71 representing your claim of out-of-pocket expenses on the removing of the concentrates after [167] November 30, 1948, isn't that a fact?

A. My understanding of the discussion that we had—

Mr. Donahue: —I would like to have you answer my question rather than give me your understanding. I asked a direct question.

A. I would have to answer the question no, because in our discussion with the Bureau of Federal Supply the question of the entire cost was discussed with them and they indicated their willing-

(Testimony of Wallace G. Wolf.)

ness to pay the cost that we incurred after this date of December 3, 1948.

Q. They indicated they would pay 40 odd thousand dollars? A. Yes, sir.

Q. And then you went to the Reconstruction Finance Corporation to find out if they would pay the balance of approximately \$14,000.00?

A. That is correct.

Q. You never at any time made any demand upon the Reconstruction Finance Corporation for payment of this entire claim, did you?

A. At the time of the——

Q. Just answer that yes or no, if you please?

A. I think we did make a demand.

Q. Have you any correspondence or anything in your files that would show that you ever made any demand upon the Reconstruction Finance Corporation prior to this lawsuit for [168] \$54,000.00?

Mr. Horning: That is objected to as repetition, it was all gone into yesterday.

The Court: I know it was.

Mr. Donahue: But it was opened up again this morning.

The Court: I don't think it was but I will let him answer.

Q. You may answer that question, if you know?

A. I am uncertain as to that; I cannot answer yes or no with any certainty.

Q. You have nothing in your records, no correspondence to show that you made any demand upon

(Testimony of Wallace G. Wolf.)

the Reconstruction Finance Corporation for payment of any sums that became due because of the removal of concentrates after December 30, 1948?

A. The work that was done by our company——

Q. ——I am just asking if you have any correspondence in your files that indicate that such demand was ever made, you can answer that yes or no.

A. I cannot answer yes or no with certainty but I can explain that subsequent to this the question of the claim was taken up by my superiors through Mr. Harlan in Washington and that was outside of my province, I didn't follow it too closely and so I am not too conversant with it. [169]

Q. Mr. Harlan is the representative of the Sullivan Mining Company or was the representative of the Sullivan Mining Company in February of 1951?

A. Yes, for this particular subject he was.

Q. You may not know this, Mr. Wolf, but I will ask, I am reading from a letter that was addressed to the Reconstruction Finance Corporation on February 13, 1951, re Sullivan Mining Company claim for reimbursement for inbound costs in connection stockpiling zinc concentrates under contract AA-29 as amended. I am only going to read from portions of it, it was signed by Mr. Harlan and goes on,——

Mr. Horning: ——Now, if the Court please, we object——

The Court: Let him go ahead, I want this entire matter to go in if he desires it.

Q. It goes on: "In accordance with the understanding reached October 31, at the meeting held

(Testimony of Wallace G. Wolf.)

in the office of Mr. Harold W. Sheehan, counsel, Reconstruction Finance Corporation, at which Mr. Harold W. Sheehan and Mr. T. J. Doherty, representing Reconstruction Finance Corporation, and Mr. Charles R. Ince and the undersigned, representing the Sullivan Mining Company, were present. I hereby make claim, on behalf of the Sullivan Mining Company for reimbursement in the sum of \$14,595.39 covering the proportionate [170] share of the total inbound stockpiling costs applicable to the 19,224.0600 wet tons of zinc concentrates which were removed from Sullivan Mining Company stockpile, for shipment to Anaconda Copper Company prior to December 1, 1948.

“There is attached a signed statement reflecting the nature of each item of expense and summarizing the work performed to which the charges apply, for all of the zinc concentrates stockpiled between June, 1942, and November, 1946, when the purchase of zinc concentrates for stockpiling for Metals Reserve Company ceased.” Now, have you ever——

The Court: ——In view of that question I will admit Exhibit No. 36 with the explanation added. I will say in admitting this exhibit that I admit it subject to the objection. I think you gentlemen understand that with the mass of correspondence the Court is going to have to sort out what applies and what does not apply. There is a great deal of testimony all through this record that I feel may be incompetent as evidence but in order to determine that it is going to take a good deal of study

(Testimony of Wallace G. Wolf.)

on the part of the Court, so I will admit this exhibit now and in view of the fact that we have a great portion of the contents anyway, I will admit it subject to the objection of the defendant and if I [171] find that it is immaterial I will strike it.

Mr. Donahue: I assume, your Honor, if the Court felt that certain portions are admissible and other portions are self serving those portions will be stricken.

The Court: That is correct, and that is true in connection with this entire matter,—there are a great many reservations made throughout this entire record, of course, I would have to rule right now if we were trying this matter before a jury but in view of the fact that it is before the Court I can take some time, of course, the Court has knowledge of all of these things anyway and whether these matters were stricken or not the knowledge would still be there and necessarily I will have to sort all of this mass of correspondence and other documents later.

Mr. Donahue: That is all, Mr. Wolf.

Mr. Brown: There is no further question.

VERNON ROEHL

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Brown): Where do you reside, Mr. Roehl?

(Testimony of Vernon Roehl.)

A. Silver King, near Kellogg, Idaho. [172]

Q. By whom are you employed?

A. The Sullivan Mining Company.

Q. In what capacity?

A. Chief accountant.

Q. How long have you been employed by the Sullivan Mining Company?

A. Since 1924. The zinc plant was built in 1926 and I was in the Wallace office prior to the time that I went to the zinc plant.

Q. You are chief accountant at the Silver King Mining Company electrolytic zinc plant?

A. Yes, sir.

Q. Were you working in that capacity in the years 1942 through 1948? A. I was.

Q. Very briefly I will ask you to state what Exhibit No. 37 is, it has been handed to you?

A. Exhibit No. 37 is a series of vouchers making payment through Bunker Hill smelter for the various unloading charges and other charges of maintaining the bins and for the bins for the stockpile of concentrates which were actually located at the Bunker Hill smelter.

Mr. Brown: I did not intend that Mr. Roehl should go into such detail, I just wanted a statement [173] as to what they were and I was going to offer them in evidence.

The Court: Let me ask one question. Is there any dispute at all about the question of the expenditure of this money in stockpiling this material?

(Testimony of Vernon Roehl.)

Mr. Donahue: I don't think so, however, I feel from my standpoint as attorney for the Reconstruction Finance Corporation and I do not intend to take much time, but if the invoices or vouchers as such are here I would prefer to have them admitted in evidence. I do not care to go into these fully but I do prefer that they be in evidence.

Mr. Brown: There is one matter that I think should be explained by this witness or I can do it for Mr. Roehl if the Court would prefer.

Mr. Donahue: I certainly do not have any objection to Mr. Brown's explaining it.

Mr. Brown: The statement rendered and attached to these voucher checks include each month from the Bunker Hill to the Sullivan Mining Company charges other than the particular charges that relate to the unloading and stockpiling of the zinc concentrates. It might have covered a number of items in any given month and items that had nothing to do with the stockpile, there was no allocation of the cost. They were itemized but there are [174] various other charges from the Bunker Hill to them and there was no allocation and there is no allocation on these exhibits, of the costs between the stockpiling done by the Sullivan Mining Company on its own account and on the account of the Government.

The Court: I see.

Q. Mr. Roehl, you have been handed Exhibit No. 38, 39 and 40. I will ask you to state briefly what those are.

(Testimony of Vernon Roehl.)

A. Exhibit 38, 39 and 40 are exhibits which consist of invoices issued by the various vendors to the Sullivan Mining Company for lumber used in stockpiling.

Q. For the construction of bins?

A. Yes, the construction of bins and the maintenance.

Mr. Brown: I offer these in evidence.

Mr. Donahue: These are lumber invoices?

Mr. Brown: Yes, sir.

Mr. Donahue: We have no objection.

The Court: They may be admitted.

Q. Mr. Roehl, you have Exhibit No. 28, can you examine the last document on that exhibit which is a breakdown of the cost and explain that?

A. The last document is a transposition on the costs taken from the Sullivan Mining Company records under my supervision and shows the breakdown of those costs which relate to the placing of the zinc concentrates into the stockpiling storage bins for the period of June, [175] 1942, through November, 1946.

Q. Were the items of lumber costs, unloading costs and labor costs and all costs that are in there made up from the vouchers, Exhibit No. 38, 39 and 40?

A. They were.

Mr. Brown: That is all.

Cross Examination

Mr. Brown: Before you start, Mr. Donahue, it

(Testimony of Vernon Roehl.)

was called to my attention that on my last question I omitted Exhibit 37. I presume these records or rather this exhibit was made up from the four exhibits, 37, 38, 39 and 40? A. Yes.

Q. (By Mr. Donahue): I am just taking the first voucher at random from Exhibit No. 37, "Sullivan Mining Company pay to the order of Bunker Hill smelter, Kellogg, Idaho, your statement of July 11, 1942", do you have supporting invoices?

A. Supporting statement was issued by the smelter.

Q. There are invoices attached?

A. Invoices for supplies.

Q. You have "4 barrels caustic soda——

A. ——Those have no relation to this. [176]

Q. 52 pounds of rivets, 2 drums sairset, 5 drums caustic soda. There are other items and then there is "your portion of custom officers' salary and the last one charged for crane, handling Star zinc concentrate, this item is \$662.96. Am I correct in stating that you have taken these invoices in making up this claim against the Sullivan Mining Company for the crane and train services, lumber costs, and so forth, that you went over them and took out from the whole invoice, the items that apply in this situation? A. That is right.

Mr. Donahue: I believe that is all.

Mr. Brown: That is all. I think at this time, if the Court please, that if we may have a short recess it may be that we will finish with this witness and that will be our case.

The Court: I will be happy to grant you a recess. We will be in recess for a few minutes.

Mr. Brown: May I proceed now?

The Court: Yes, go ahead.

Mr. Brown: At this time, if your Honor please, the plaintiff rests.

Mr. Donahue: At this time, the plaintiff in the case having rested, for the purpose of the record I want to ask that the Court direct a judgment in favor [177] of the defendant upon the grounds that the plaintiff has wholly failed to prove the allegations of its complaint, particularly, the plaintiff having the burden of proof in this case has failed to prove more particularly paragraph six and paragraph eight of their or rather of its complaint. I feel that the evidence in this case indicates clearly that it is based upon a contract. One contract as entered into in June, 1942, that contract was amended in July of 1944 and subsequently there was an assignment by the defendant, Reconstruction Finance Corporation, of all of its liability under this contract, to the Bureau of Federal Supply, Treasury Department. That assignment was agreed to by the plaintiff in the action and the assignment was made in conformity with the strategic and critical stockpiling Act or Public Law 520, 79th Congress, approved July 23, 1946. The assignment was brought about by specific statute passed by Congress. The assignment not only had to be made because of the statute but the assignment has been agreed to and the plaintiff has at all times

acted under the assignment. That certainly knocks out the second portion of their prayer for damages or relief in the sum of \$40,268.71 and as far as the prayer for relief for the sum of \$14,595.39, which was based upon the inbound cost [178] of stockpiling previous to the assignment or previous to December 30, 1948. If they have any claim at all against Reconstruction Finance Corporation on that, it has to be by virtue of this agreement. The first agreement emphatically says "We will do this stockpiling at no cost"——

The Court: ——I think you will appreciate the fact as well as I, I don't know what else can be added at this time, it seems to me that the evidence for both sides is clearly before the Court——

Mr. Donahue: ——I agree thoroughly with the Court.

The Court: From all of the testimony that has been introduced here, as the plaintiff's case progressed, the defendant's case progressed right along with it. If I were to decide this motion at this time it would practically be a final decision of the case. I suppose that the proper method would be that I should rule before you proceed farther,—I do not know whether you have anything else to offer here.

Mr. Donahue: In order that the Court may be clear on this matter I will say that the only witness that I have was a witness and is a witness from Washington that was brought here for the purpose of identifying some of the records and documents,

and as they have been introduced now I see no reason for using my only witness. [179]

The Court: It would be perhaps an unusual procedure but if I could take this motion under advisement with the understanding that if the motion was not granted your case was rested,—

Mr. Donahue: That is agreeable, your Honor, and it can be put in the record.

The Court: Then if you rest I will have the matter entirely before me and I will have a record that is complete.

Mr. Donahue: I will state to the Court in view of your Honor's observations and remarks that the defendant Reconstruction Finance Corporation will be considered as having rested at the time your Honor makes his decision on the motion.

(Further remarks of Court and counsel, reported but not transcribed, concerning time for filing briefs, and so forth.)

The Court: It is understood now the record may show that both sides have rested.

Mr. Brown: That is right.

Mr. Donahue: Yes, the defendant has nothing further.

The Court: Then the record may show the matter is taken under advisement awaiting the filing of briefs by counsel. [180]

[Endorsed]: No. 14755. United States Court of Appeals for the Ninth Circuit. Reconstruction Finance Corporation, a corporation, Appellant, vs. Sullivan Mining Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: May 4, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14755

SULLIVAN MINING COMPANY, a corporation,
Appellee,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation, Appellant.

REQUEST FOR PRINTING OF RECORD AND
STATEMENT OF POINTS

I.

Appellant deems consideration by the Appellate Court of the entire record certified to this Court by the Clerk of the District Court necessary on this appeal to a proper understanding of the questions presented excepting and omitting therefrom the following:

- (a) Plaintiff's Exhibit No. 1.
- (b) Plaintiff's Exhibit No. 2.
- (c) All of Plaintiff's Exhibit No. 4, except the first two pages thereof.
- (d) The first two pages of Plaintiff's Exhibit No. 13.
- (e) Plaintiff's Exhibit No. 15.
- (f) Plaintiff's Exhibit No. 19.
- (g) Plaintiff's Exhibit No. 26.
- (h) Plaintiff's Exhibit No. 27.
- (i) Plaintiff's Exhibit No. 37.
- (j) Plaintiff's Exhibit No. 38.
- (k) Plaintiff's Exhibit No. 39.
- (l) Plaintiff's Exhibit No. 40.
- (m) Defendant's Exhibit No. 36.

and Appellant hereby requests that the same be printed with the deletions above outlined unless the Court should grant Appellant's Motion heretofore made to the Appellate Court that the Exhibits be considered in their original form without reproduction.

II.

Appellant hereby designates for consideration on this appeal the following points on which it intends to rely:

(1) The Trial Court erred in disregarding the plain language of that portion of the original letter agreement (Plaintiff's Exhibit No. 3) which provided that the Plaintiff, Sullivan Mining Company, would stockpile at its own expense, all materials purchased under the agreement.

(2) The Trial Court erred in completely disre-

garding the storage and ownership certificate in the form of Exhibit "A" attached to the original letter agreement (Plaintiff's Exhibit No. 3) which provides that the zinc concentrates stockpiled by Plaintiff "are owned by the Metals Reserve Company or the holder thereof and will be released and delivered by the holder hereof upon the surrender of the certificate properly endorsed".

(3) The Trial Court erred in its interpretation of that part of the amended letter agreement dated July 12, 1944 (Plaintiff's Exhibit No. 6) which reads as follows:

"If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)".

in that the Court found that the words "actual out-of-pocket expense incurred in connection therewith" referred not only to the cost of removal of the concentrates shipped elsewhere but also to the cost of establishing and maintaining the stockpile from the inception of the original letter agreement (Plaintiff's Exhibit No. 3).

(4) The Trial Court erred in not finding as a matter of law, that the Defendant, Reconstruction

Finance Corporation was relieved of all liability to the Plaintiff with reference to the original stockpiling agreement (Plaintiff's Exhibit No. 3) and amendments thereto, subsequent to November 30, 1948, by virtue of assignment of the contract to the Bureau of Federal Supply (Treasury Department) dated November 30, 1948 (Plaintiff's Exhibit No. 22) and it was error even if any liability did exist under the original contract or amendments thereto to enter judgment in any sum against the Defendant, Reconstruction Finance Corporation in excess of \$14,595.39, for the reason that the assignment (Plaintiff's Exhibit No. 22) and the approval and acceptance of the assignment by the Plaintiff, Sullivan Mining Company, (Defendant's Exhibit No. 35) fully relieved the Defendant, Reconstruction Finance Corporation, from any and all liability to Plaintiff, Sullivan Mining Company, for concentrates removed from the stockpile after November 30, 1948.

(5) The Court erred in making and entering Finding of Fact No. V, as follows:

"It was the understanding of both parties to said contract that in consideration of the Plaintiff's stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations".

because there is no evidence in the record that the Plaintiff, Sullivan Mining Company, was to have

the legal right to re-purchase the concentrates and process and market the same and thus derive the profit as it would in the case of its usual custom smelting operations.

(6) The Court erred in making and entering Finding of Fact No. IX, as follows:

“It was the plaintiff’s understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944 was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stock-piling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment”.

because there is no evidence in the record to support the same.

(7) The Court erred in making and entering that part of Finding of Fact No. XVII which reads as follows:

“The plaintiff offered to purchase these remaining stockpile concentrates but its offer was not accepted”

because such Finding is against the clear weight of the evidence.

(8) The Trial Court erred in completely disregarding the provisions of the contract (Plaintiff’s Exhibit No. 3) and the amendment thereto (Plain-

tiff's Exhibit No. 6) and basing its decision upon the pure assumption that the stockpiling of the concentrates was solely for the benefit of Reconstruction Finance Corporation (Memorandum Opinion Tr. pp. 16-18) instead of recognizing that the stockpiling agreement under the contract was also for the benefit of Sullivan Mining Company.

(9) The evidence introduced by Plaintiff is entirely insufficient to support the verdict and the Defendant's Motion for a Directed Verdict in its favor should have been granted.

(10) The Complaint alleges a specific agreement for reimbursement for the cost of stockpiling. The clear weight of the evidence indicates that there was no such agreement and the Trial Court, by its decision, has attempted to write a new agreement for the parties.

(11) The Trial Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 21 (RPT 69) for the reason that said Exhibit is a Contract sent to Sullivan Mining Company by the Bureau of Federal Supply (Treasury Department) which said Bureau of Federal Supply has not been made a party to the action and for the further reason that said Contract (Exhibit No. 21) was never executed and, therefore, became incompetent as to any issue involved in the litigation.

(12) That the Trial Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 23 (RPT 76); Plaintiff's Exhibit No. 24 (RPT 80); Plaintiff's Exhibit No. 25 (RPT 84-87); Plaintiff's Exhibit No. 28 (RPT 97); and

Plaintiff's Exhibit No. 29 (RPT 99-100) for the reasons that all of said Exhibits consist of correspondence between Plaintiff, Sullivan Mining Company, and the Bureau of Federal Supply (Treasury Department) and become hearsay and otherwise irrelevant, incompetent and immaterial because the Bureau of Federal Supply (Treasury Department) is not a Party Defendant to this action and also because the Defendant, Reconstruction Finance Corporation, by virtue of Assignment dated November 30, 1948 (Plaintiff's Exhibit No. 22), ceased to have any rights, powers, privileges, duties or obligations under the original Contract (Plaintiff's Exhibit No. 3), and amendments thereto.

/s/ L. VINCENT DONAHUE,

/s/ STIMSON & DONAHUE,

/s/ TOM B. PAINE,

Attorneys for Defendant and
Appellant

[Endorsed]: Filed April 22, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed between the attorneys for Appellee and Appellant in the above entitled action that with the approval of the United States Circuit Court of Appeals for the Ninth Circuit, that the Appellate Court may be relieved from

printing and reproducing the exhibits transmitted to the Appellate Court from the United States District Court for the District of Idaho, Northern Division, and that said exhibits in said cause, being Exhibits 1 to 40 inclusive, except No. 34 which was not offered in evidence, may be considered in their original form without reproduction into the printed record to be prepared by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 16th day of April, 1955.

/s/ CHAS. E. HORNING,

/s/ ROBERT E. BROWN,

Attorneys for Appellee

/s/ L. VINCENT DONAHUE,

Attorney for Appellant

[Endorsed]: Filed April 22, 1955. Paul P. O'Brien, Clerk.



IN THE

United States
Court of Appeals
FOR THE NINTH CIRCUIT

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

SULLIVAN MINING COMPANY,
a corporation,

Appellee.

APPELLANT'S OPENING BRIEF

*Upon Appeal from the District Court of the United
States for the District of Idaho
Northern Division*

STIMSON & DONAHUE,
L. VINCENT DONAHUE,
421 Symons Building,
Spokane, Washington.

TOM B. PAINE,
Wallace, Idaho,

Attorneys for Appellant.

FILED

AUG -4 1955



INDEX

	Page
Jurisdiction -----	1
Statement of Case -----	4
Specifications of Error -----	10
Argument :	
Interpretation of Letter Agreements -----	15
Contract to Be Construed as a Whole -----	25
Conduct and Acts of Parties -----	28
Specification of Error No. 7 -----	35
Other Hearsay Testimony Improperly Admitted	38
Effect of Assignment of Letter	
Agreements from Reconstruction Finance	
Corporation to Bureau of Federal Supply ----	38
Conclusion -----	43

TABLE OF CASES

	Page
<i>Moers vs. Moers</i> , 14 A. L. R. 225, 229 N. Y. 294, 128 N. E. 202 -----	42
<i>Wanamaker vs. Comfort</i> , 53 Fed. (2d) 751; 81 A. L. R. 133 -----	42
<i>Watts vs. Smith</i> , 91 A. L. R. 1206; 63 S. W. (2) 796 -----	42
<i>Zartman-Thalman Carriage Company vs.</i> <i>Reid and Lowe</i> , 73 S. W. 942 -----	21

TEXT BOOKS

4 American Jurisprudence, Assignments, Page 233 -----	41
17 Corpus Juris Secundum, Sec. 297, Pages 707-711 -----	25
66 Corpus Juris Secundum, Novation, Page 682 ---	42
20 R. C. L., Page 359 -----	41
3 Williston on Contracts (Revised Edition), Sec. 618, Page 1779 -----	25

STATUTES

15 U. S. C. A., Sec. 611 -----	2
15 U. S. C. A., Sec. 603 (a) -----	3
28 U. S. C. A., Sec. 225 (a) (d) -----	3
28 U. S. C. A., Sec. 128 -----	3

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

RECONSTRUCTION FINANCE CORPORATION,
a corporation, *Appellant,*
vs.

SULLIVAN MINING COMPANY,
a corporation, *Appellee.*

APPELLANT'S OPENING BRIEF

JURISDICTION

This action was brought by the Appellee, Sullivan Mining Company, a corporation organized and existing under the laws of the State of Idaho, against the Appellant, Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government. The action was predi-

ated upon a certain Letter Agreement made and entered into between the Metals Reserve Company, a corporation also created by an Act of Congress on or about June 28, 1940, and the Sullivan Mining Company, an Idaho corporation, and amendments made to said Letter Agreement dated July 12, 1944, covering the purchase and stockpiling of zinc concentrates for the account of Metals Reserve Company; and the claim by Sullivan Mining Company that, under said Letter Agreements it is entitled to the payment of sums aggregating \$54,864.10, together with interest thereon at the rate of 6% per annum from October 12, 1948.

The Metals Reserve Company was dissolved by an Act of Congress dated June 30, 1945, 15 U. S. C. A., Section 611, and by said Act all of its functions, commitments and liabilities were transferred to and assumed by the Appellant, Reconstruction Finance Corporation (Tr. 5).

The controversy was, therefore, a controversy, which at the time of the commencement of the action was and still is between Sullivan Mining Company, an Idaho corporation, and a citizen of the State of Idaho as Appellee, and Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States of America, the capital stock of which said corporation is wholly owned by the United States Government, and the amount in controversy is and was at the time of the commencement of

the action in excess of Three Thousand Dollars and involves the construction and interpretation of certain Agreements, Assignments and correspondence between the parties.

Jurisdiction of the District Court is based upon the provisions of 15 U. S. C. A., Section 603 (a) (Tr. 4).

The Appeal to this Court is from the final judgment decreeing that the Appellee, Plaintiff below, have judgment against Appellant, Defendant below, in the sum of \$54,864.10, together with interest at the rate of 6% per annum from October 12, 1948, and from an Order denying Defendant's Motion for a new trial entered February 15, 1955. Notice of Appeal was filed in the office of the Clerk of the District Court for the District of Idaho, Northern Division, on the 12th day of March, 1955, and jurisdiction is believed to exist under Section 225 (a) and (d), Title 28 U. S. C. A. and (d) Title 28 Section 225 (a) and (d) Title 28 U. S. C. A. Judicial Code, Sec. 128 amended (Tr. 29 to 33).

STATEMENT OF THE CASE

On February 9, 1942, the Office of Price Administration issued a release announcing that for the purpose of expanding the output of copper, lead and zinc by domestic mine operators, the United States Government, acting through Metals Reserve Company (a corporation created under the Reconstruction Finance Corporation Act) would, for a period of two and one-half years beginning as of February 1, 1942, pay certain premium prices for all copper, lead and zinc which should be produced under certain specified quotas based upon 1941 production from the particular properties to which such quotas should be assigned (plaintiff's Exhibit No. 1). The aforesaid announcement was followed by a letter dated February 12, 1942, from Metals Reserve Company to Sullivan Mining Company, explaining in detail the operation of the premium price plan and requesting Sullivan Mining Company to act as the agent of Metals Reserve Company in the administration of the program (Plaintiff's Exhibit No. 2). The Agency was accepted by Sullivan Mining Company (Tr. 44).

Pursuant to Sullivan Mining Company's acceptance of such Agency, the Metals Reserve Company caused to be drafted in Washington, D. C., and signed by its executive Vice-President and then forwarded to Sullivan Mining Company for its approval and execution, the Letter Agreement which was admitted in evi-

dence as Plaintiff's Exhibit No. 3 (Tr. 46). This Letter was dated June 18, 1942. It was executed by Sullivan Mining Company in the exact form in which it was submitted.

This Agreement provided that Sullivan Mining Company, as agent for Metals Reserve Company, should purchase for the account of Metals Reserve Company, zinc concentrates in specified monthly quantities. These concentrates were to be stockpiled by Sullivan Mining Company at its own expense, on its property at Silver King, Idaho, in such a manner that such stockpile would be segregated and entirely independent from, and in no way connected with, any other stockpile heretofore or hereafter existing on the property of the Sullivan Mining Company.

The Agreement further provided that the material purchased for the account of Metals Reserve Company would, if in excess of the producer's monthly production quota, be eligible for premium payments in accordance with the established procedure then in effect.

The Agreement also contained the following provision:

"We understand that you desire the material purchased hereunder for our account to be sold to you from time to time as you are able to treat same. In such connection, you will advise us in writing of the quantity and quality of material desired and the date when same will be needed" (Pls. Ex. 3).

Thereafter, on July 12, 1944, the original Letter Agreement (Plaintiff's Exhibit No. 3) was amended by Plaintiff's Exhibit No. 6. Subdivision 2 of this Amended Letter Agreement provides as follows:

"If this Company should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)."

Thereafter between August 9, 1944, the date of said Contract modification and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the Plaintiff upon which Plaintiff incurred actual out-of-pocket expense in connection with the input of concentrates and in erecting and maintaining the stockpile "as distinguished from the removal of concentrates" in the sum of \$14,595.39. It is not disputed that all expenses in connection with the actual removal of said concentrates by Metals Reserve Company and Reconstruction Finance Corporation have been paid (Ex. 36, first three pages).

That at the time the amendment to the original stockpiling Contract was made July 12, 1944 (Plaintiff's Exhibit No. 6), said Letter Agreement provided among other things as follows:

“Metals Reserve may assign its interest under this Contract to any other branch or agency of the Government of the United States of America, and upon such assignment such assignee shall acquire all the rights, powers and privileges of Metals Reserve hereunder, and shall be bound by all the duties and obligations of Metals Reserve hereunder, and Metals Reserve shall thereby cease to have any rights, powers, privileges, duties or obligations hereunder, it being expressly understood that any such assignment by Metals Reserve of its interest in this contract shall be subject to all the rights, powers and privileges of contractor hereunder and shall be conditioned upon such assignee's assuming all duties and obligations of Metals Reserve hereunder.”

That on or about the 22nd day of October, 1948, Plaintiff, Sullivan Mining Company was advised by letter from Defendant (Plaintiff's Exhibit No. 17) that the Defendant was going to transfer and assign the physical custody of the entire government stock-piles of zinc concentrates stored by Sullivan Mining Company to the Treasury Department, Bureau of Federal Supply, which has since become Emergency Procurement Service under General Services Administration. That said assignment was duly made and became effective on the 30th day of November, 1948. That said Assignment provided among other things that (Plaintiff's Exhibit No. 22):

“It being expressly understood and agreed that said Assignee shall hereby acquire all the rights, powers and privileges of Assignor under said agreement, as amended, and Assignor shall here-

by cease to have any rights, powers, privileges, duties or obligations under said agreement, as amended, it being further expressly understood that this assignment by Assignor of its interest in said agreement as amended shall be and is subject to all the rights, powers and privileges of said Sullivan Mining Company under said agreement as amended, and shall be and is conditioned upon Assignee's assuming all duties and obligations of Assignor under said agreement as amended."

That subsequent to said assignment, the Bureau of Federal Supply (Treasury Department) caused to be removed 53,039.58 tons of such stockpile concentrates upon which the Plaintiff had incurred an actual out-of-pocket indebtedness in placing said concentrates in storage and maintaining stockpile facilities in the sum of \$40,268.71. That all expenses in connection with the actual removal of said concentrates from the stockpile subsequent to September 1, 1948, were paid for by the Bureau of Federal Supply (Treasury Department).

It was apparently the theory of the Trial Court that the interpretation of the amended letter agreement (Plaintiff's Exhibit No. 6) required the Defendant to pay to the Plaintiff all of its out-of-pocket expenses incurred not only in connection with the removal of the material from the stockpile for sale to other parties, but also required the Defendant to pay to the Plaintiff all costs in connection with the establishment and maintenance of the stockpile from the date of the inception of the original Letter Agreement (Plaintiff's

Exhibit No. 2). It also appears that it was the theory of the Trial Court that the Assignment (Plaintiff's Exhibit No. 22) and the acceptance of the Assignment by the Plaintiff, Sullivan Mining Company (Defendant's Exhibit No. 35) did not relieve Reconstruction Finance Corporation from liability for concentrates removed from the stockpile subsequent to November 30, 1948 (Tr. 16, 17, 18).

SPECIFICATIONS OF ERROR

1. The District Court erred in disregarding the plain language of that portion of the original Letter Agreement (Plaintiff's Exhibit No. 3) which provided that the Plaintiff, Sullivan Mining Company, would stockpile at its own expense, all materials purchased under the Agreement.

2. The District Court erred in completely disregarding the storage and ownership certificate in the form of Exhibit "A" attached to the original Letter Agreement (Plaintiff's Exhibit No. 3) which provides that the zinc concentrates stockpiled by Plaintiff "are owned by the Metals Reserve Company or the holder thereof and will be released and delivered by the holder hereof upon the surrender of the certificate properly endorsed."

3. The District Court erred in its interpretation of that part of the amended Letter Agreement dated July 12, 1944 (Plaintiff's Exhibit No. 6), which reads as follows:

"If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the

work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)."

in that the Court found that the words "actual out-of-pocket expense incurred in connection therewith" referred not only to the cost of removal of the concentrates shipped elsewhere but also to the cost of establishing and maintaining the stockpile from the inception of the original Letter Agreement (Plaintiff's Exhibit No. 3).

4. The District Court erred in not finding as a matter of law, that the Defendant, Reconstruction Finance Corporation was relieved of all liability to Plaintiff with reference to the original stockpiling agreement (Plaintiff's Exhibit No. 3) and amendments thereto, subsequent to November 30, 1948, by virtue of assignment of the contract to the Bureau of Federal Supply (Treasury Department) dated November 30, 1948 (Plaintiff's Exhibit No. 22); and it was error even if any liability did exist under the original contract or amendments thereto to enter judgment in any sum against the Defendant, Reconstruction Finance Corporation in excess of \$14,595.39, for the reason that the assignment (Plaintiff's Exhibit No. 22) and the approval and acceptance of the assignment by the Plaintiff, Sullivan Mining Company (Defendant's Exhibit No. 35), fully relieved the Defendant, Reconstruction Finance Corporation from any and all liability to Plaintiff, Sullivan Mining Company, for concen-

trates removed from the stockpile after November 30, 1948.

5. The District Court erred in making and entering Finding of Fact No. V, as follows:

“It was the understanding of both parties to said contract that in consideration of the Plaintiff’s stockpiling said concentrates at its own expense it was to have the right to re-purchase said concentrates and to process and market the same and thus derive a profit as it would in the case of its usual custom smelting operations.”

because the evidence does not support any such agreement.

6. The District Court erred in making and entering Finding of Fact No. IX, as follows:

“It was the plaintiff’s understanding and was also the understanding and the intent of the Government at the time said amendment of July 12, 1944, was drafted by the Government and approved by the plaintiff that the plaintiff was to bear the expense of stockpiling all concentrates which should thereafter be processed by the plaintiff but that the plaintiff was to be reimbursed by the Government for all expenses incurred by the plaintiff in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment.”

because there is no evidence in the record to support the same.

7. The District Court erred in making and entering that part of Finding of Fact No. XVII which reads as follows:

“The plaintiff offered to purchase these remaining stockpile concentrates but its offer was not accepted.”

because such Finding is against the clear weight of the evidence.

8. The District Court erred in disregarding the provisions of the contract (Plaintiff's Exhibit No. 3) and the Amendment thereto (Plaintiff's Exhibit No. 6) and basing its decision upon the assumption that the stockpiling of the concentrates was solely for the benefit of Reconstruction Finance Corporation (Memorandum Opinion, Tr. 16).

9. The evidence introduced by Plaintiff is entirely insufficient to support the judgment and the Defendant's Motion to enter a judgment in its favor should have been granted.

10. The Complaint alleges a specific Agreement for reimbursement for the cost of stockpiling. The clear weight of the evidence indicates that there was no such Agreement and the District Court, by its decision, has attempted to write a new Agreement for the parties.

11. The District Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 21 (Tr. 99) for the reason that said Exhibit is a Contract sent to Sullivan Mining Company by the Bureau of Federal Supply (Treasury Department) which said Bureau of Federal Supply has not been made a party to the action and for the further reason that said Contract (Plaintiff's Exhibit No. 21) was never executed and, therefore, became incompetent as to any issue involved in the litigation.

12. The District Court erred in admitting in evidence, over Defendant's objection, Plaintiff's Exhibit No. 23 (Tr. 104), for the reason that said Exhibit consisted of correspondence between Plaintiff, Sullivan Mining Company, and the Bureau of Federal Supply (Treasury Department) and becomes heresay and otherwise irrelevant, incompetent and immaterial because the Bureau of Federal Supply (Treasury Department) is not a Party Defendant to this action and also because the Defendant, Reconstruction Finance Corporation, by virtue of Assignment dated November 30, 1948 (Plaintiff's Exhibit No. 22), ceased to have any rights, powers, privileges, duties or obligations under the original Contract (Plaintiff's Exhibit No. 3) and amendments thereto.

ARGUMENT

INTERPRETATION OF LETTER AGREEMENTS

The Specifications of Error Nos. 1, 2, 3, 5, 6, 8, 9 and 10 all deal with what Appellant conceives to be the wrongful interpretation by the Trial Court of the original Letter Agreement (Plaintiff's Exhibit No. 3) and amendatory Letter Agreement (Plaintiff's Exhibit No. 6) and for the convenience of the Court, we will discuss these specifications together.

It is the theory of the Appellant that there was no agreement, either express or implied, whereby Appellant agreed to reimburse Sullivan Mining Company for establishing the stockpile or for unloading materials into the stockpile. The original Letter Agreement (Plaintiff's Exhibit No. 3) cannot be so construed. The case was tried on the theory that there was a written agreement between Appellant and Sullivan Mining Company to pay for the cost of establishing and maintaining a stockpile. No such agreement was ever established and it became the duty of the District Court to decide the case in favor of the Defendant, Reconstruction Finance Corporation, because of a complete failure of proof on the part of the Appellee, Sullivan Mining Company, to sustain the allegations of its Complaint.

The original Letter Agreement (Plaintiff's Exhibit No. 3) expressly provides for the stockpiling of such material by the Sullivan Mining Company at its own expense. This Agreement was amended at various times at Sullivan's request in order to increase the amount of zinc concentrates that could be purchased monthly and the aggregate amount that could be purchased.

The Amended Letter Agreement (Plaintiff's Exhibit No. 6), dated July 12, 1944, and accepted by the Mining Company on August 9, 1944, reads in part as follows:

"If this Company (Metals Reserve Company) should for any reason remove material from stockpile for any purpose other than for sale to you (Sullivan Mining Company), you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)."

By a letter, dated February 13, 1951 (Plaintiff's Exhibit No. 36), Messrs. Shinn, Grimes, Harlan, Strong and Carson, Washington counsel for Sullivan Mining Company, submitted a claim in the amount of \$14,595.39 predicated upon the above quoted paragraph of the Amendatory Agreement of July 12, 1944. They took the position that the word "therewith" modified or referred to the word "material" and that consequently,

Sullivan Mining Company was entitled to reimbursement for out-of-pocket expenses incurred in connection with the stockpiling of the material which was removed by Metals Reserve Company or Reconstruction Finance Corporation. It was the contention of the Appellant, that a proper interpretation of this paragraph would be that Sullivan Mining Company would be reimbursed for actual out-of-pocket expenses incurred in connection with the removal of the material from stockpile, and since Sullivan Mining Company had been reimbursed for expenses incurred in the removal of such material, the claim was denied (Plaintiff's Exhibit No. 12).

The Complaint filed in this case against Reconstruction Finance Corporation (successor to Metals Reserve Company) in the District Court of the United States for the District of Idaho, Northern Division, alleges in Paragraphs V and VI and VIII thereof, as follows:

“V.

“On or about June 18, 1942, plaintiff entered into a contract in writing with said Metals Reserve Company in and by which it was provided and agreed, among other things, that plaintiff, as agent for said Metals Reserve Company, should purchase for the account of said Metals Reserve Company zinc concentrates in specified monthly quantities, the purchase price of said concentrates to be paid by Metals Reserve Company: that said concentrates so purchased should be stockpiled by the plaintiff at its expense and should thereafter

be sold by said Metals Reserve Company to the plaintiff from time to time as the plaintiff should be able to process the same at its said smelter (Tr. 4).

“VI.

“That a modification of said contract was thereafter, to-wit, on August 9, 1944, approved in writing by plaintiff and said Metals Reserve Company providing that said Metals Reserve Company should have the right at its sole option to remove all or any part of the zinc concentrates purchased and stockpiled by the plaintiff for the account of Metals Reserve Company, the plaintiff, however, to be then reimbursed for actual out-of-pocket expense incurred by the plaintiff in connection with the concentrates so stockpiled and then removed by Metals Reserve Company (Tr. 4 and 5).

“VIII.

“That between August 9, 1944, the date of said contract modification, and December 1, 1948, said Metals Reserve Company and Reconstruction Finance Corporation removed 19,224.06 tons of said zinc concentrates stockpiled by the plaintiff upon which the plaintiff had incurred actual out-of-pocket expense in the sum of \$14,595.39, and subsequent to December 1, 1948, the defendant, Reconstruction Finance Corporation, removed or caused to be removed 53,039.58 tons of such stockpiled concentrates upon which the plaintiff had incurred actual out-of-pocket expense in the sums of \$40,268.71 (Tr. 5).

* * * * *

“WHEREFORE, plaintiff prays judgment against defendant for the sum of \$54,864.10, to-

gether with interest thereon at the rate of 6% per annum from October 12, 1948, and for plaintiff's costs incurred herein" (Tr. 6).

First, it should be pointed out that the allegation in paragraph 5, to the effect that said concentrates so purchased should be stockpiled by the plaintiff, at its own expense and thereafter should be sold by said Metals Reserve Company to the plaintiff from time to time, as the plaintiff should be able to process the same at its smelter, is not entirely accurate, because attached to the Letter Agreement of June 18, 1942 (Plaintiff's Exhibit No. 3), was a Storage and Ownership Certificate referred to in the Letter Agreement as "Exhibit A." This Storage and Ownership Certificate provides that zinc concentrates after being stockpiled are owned by Metals Reserve Company, or the holder of the Certificate, which language clearly indicates that the material stockpiled might be sold to some purchaser other than Sullivan Mining Company. In addition, it is stated in the body of the Letter Agreement (Plaintiff's Exhibit No. 3):

"In order to encourage the continued production of this material in your district, deemed necessary in the war effort, this company will purchase an amount of this material, for a period of time, tendered to you in excess of your smelting capacity as hereinafter stated."

This language simply means that Metals Reserve Company would purchase such material in excess of

plaintiff's smelting capacity in order to encourage the production of such material in said district, and you cannot read into such language any intent to purchase such material exclusively for the smelting operation of Sullivan Mining Company.

The allegation in Paragraph 6 of the complaint above quoted to the effect that the plaintiff was to be reimbursed for actual out-of-pocket expense incurred by the plaintiff in connection with the concentrates so stockpiled and then removed by Metals Reserve Company has been denied by appellant in its answer (Tr. 8). This brings us to the interpretation of that part of the amended Letter Agreement dated July 12, 1944, heretofore quoted (Plaintiff's Exhibit 6). The question, of course, is whether it was the intention of the parties that the Metals Reserve Company should reimburse Sullivan Mining Company for out-of-pocket expenses incurred in connection with the removal of material from the stockpile for sale to other parties, or whether it was the intention that Metals Reserve should reimburse Sullivan Mining Company for out-of-pocket expense incurred in connection with establishing and maintaining the stockpile as well as the removal of the material that was sold to other parties.

In order to arrive at the proper interpretation of the foregoing quoted paragraph, it is necessary to read the original Agreement (Plaintiff's Exhibit No. 3), and all amendments thereto. First, it should be pointed

out that Sullivan Mining Company, under the Agreement, was acting as agent for Metals Reserve Company in connection with Metals Reserve Company's premium payment program covering excess quota production of copper, lead and zinc; and the Sullivan Mining Company agreed to purchase such materials for the account of Metals Reserve Company; and in the Letter Agreement of June 18, 1942 (Plaintiff's Exhibit No. 3), the Sullivan Mining Company agreed (top of page 2 of said Letter Agreement) that it would stockpile at its own expense such materials so purchased. It was also agreed in said Letter Agreement of June 18, 1942 (last two lines of page 3 of said Letter Agreement), that the services of Sullivan Mining Company, as agent under said agreement, would be rendered without compensation from Metals Reserve Company.

In construing the Letter Amendment of July 12, 1944 (Plaintiff's Exhibit No. 6), it is necessary to determine what was meant by the phrase "out-of-pocket expense incurred in connection therewith." Words and Phrases states that the word "therewith," according to the latest standard dictionaries of the English language, is the equivalent in meaning of the words "with that or this," or "at the same time." See *Zartman-Thalman Carriage Company vs. Reid & Lowe*, 73 S. W. 942, 99 Mo. App. 415. It seems clear that the word "therewith" in this instance referred to the removal of the material

from the stockpile. It certainly would be a strained construction if "therewith" referred to the stockpiling of the material as well as the removal of the material from the stockpile, especially since it is clear from the Agreement that the Sullivan Mining Company would stockpile the material at its own expense, and would act as agent thereunder for Metals Reserve Company without compensation. In short, the Metals Reserve Company agreed that, if any of the material was removed from the stockpile and sold to other parties, it would reimburse Sullivan Mining Company for any expense it might have incurred in removing the material from the Sullivan Mining Company stockpile for transportation to the purchasers.

It should also be noted that at the time the Amended Letter Agreement of July 12, 1944 (Plaintiff's Exhibit No. 6), was entered into, certain of the materials had already been stockpiled and Metals Reserve Company had title thereto free and clear of any charge for stockpiling. It was recognized that if some of the materials were removed from the stockpile, Sullivan Mining Company might incur some out-of-pocket expense in connection with the removal of such material from the stockpile for which it should be reimbursed, and it was for that reason that the paragraph of the Letter Amendment of July 12, 1944, herein quoted, was inserted.

The first paragraph on page 2 of the Letter Agreement of June 18, 1942 (Plaintiff's Exhibit No. 3), reads as follows:

"We will effect settlement with you on a monthly basis for the amount of material purchased for our account as aforesaid, following receipt from you monthly by our Traffic Manager of (1) your invoice, accompanied by your Storage and Ownership Certificate in the form of Exhibit "A" hereto attached, and (2) copy of your settlement sheet with each producer covering material so purchased."

And the Certificate referred therein as Exhibit "A" states:

". . . that said zinc concentrates are owned by Metals Reserve Company, or the holder thereof, and will be released and delivered to the holder hereof upon surrender of this certificate properly endorsed."

The only interpretation that can be put on the foregoing provisions is that full settlement in connection with the purchase and stockpiling of material was to be made by Metals Reserve Company each month, and that when a monthly settlement was effected in accordance with the Agreement, title to the material vested in Metals Reserve Company, or its assignees, free from any charges or expenses which might have been incurred by the Mining Company up to that time.

It may be contended that, if the parties had intended that reimbursement be confined to the cost of the removal of the material, the words "cost of removal" should have been used. This could be answered by stating that, if it were the intention of the parties for Metals Reserve Company to reimburse the Sullivan Mining Company for expenses in connection with the stockpiling of the material as well as the removal of the material, the parties should have used the words, "you will be reimbursed for actual costs incurred in connection with the stockpiling and the removal of the material."

CONTRACT TO BE CONSTRUED AS A WHOLE

We emphasize that the contract must be construed as a whole. In this connection, it is stated in 17 Corpus Juris Secundum, Sec. 297 (pp. 707-711), as follows:

“A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole.

“Individual clauses in an agreement and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect.”

Also to the same effect, see 3 *Willeston on Contracts* (Revised Edition), Sec. 618, page 1779.

In construing the contract as a whole, one must come to the conclusion that the Sullivan Mining Company was to purchase the material as agent for Metals Reserve Company and stockpile the same on its property at its own expense; that Metals Reserve Company was to effect settlement with the Sullivan Mining Company on a monthly basis for the material so purchased and stockpiled; that upon receipt of such payment and delivery of the Certificate of Ownership to Metals Reserve Company, title to the material vested

in Metals Reserve Company free and clear of all charges and expenses which may have been incurred by the Sullivan Mining Company up to that time. In short, the required terms and conditions of the contract to be performed up to that time would have been fully performed and the considerations thereunder fully satisfied by both parties. It naturally follows, therefore, that the phrase, "out-of-pocket expenses incurred in connection therewith" in the Amendatory Letter Agreement of July 12, 1944 (Plaintiff's Exhibit No. 6), could refer only to expenses incurred subsequent to the stockpiling of the material and could not include charges or expenses incurred prior to or in connection with the stockpiling of such material.

It cannot be denied that if the Sullivan Mining Company decided to purchase any of the material owned by Metals Reserve Company and stockpiled on the property of the Sullivan Mining Company, then the Sullivan Mining Company was to pay Metals Reserve Company the purchase price agreed upon and remove the same to its own smelter at its own expense. If, however, Metals Reserve Company should sell any of the material so stockpiled to a purchaser other than the Sullivan Mining Company, there would be some question as to who would go upon the property of the Mining Company to remove the material for shipment to the other purchaser, and what permission was necessary to be granted to the purchaser or its agent to go

upon the property of the Sullivan Mining Company for such purpose. Therefore, it was deemed advisable to have a definite understanding with the Sullivan Mining Company that, if it removed the material from the stockpile, weighed, and delivered it at railroad cars or trucks for transportation to the purchaser, the Sullivan Mining Company should be reimbursed for the out-of-pocket expense incurred in connection with the removal of the material. Hence, the amendment to the contract whereby Metals Reserve Company agreed to reimburse the Sullivan Mining Company for out-of-pocket expense incurred by it in connection with the removal of the material from the stockpile when sold to purchasers other than Sullivan Mining Company.

CONDUCT AND ACTS OF THE PARTIES

The District Court appears to have predicated its decision to a large extent upon the theory that it would work a great injustice upon the Sullivan Mining Company if it was not paid the money actually spent in establishing and maintaining the stockpile in question. It is the contention of appellant that the moving consideration which prompted Sullivan Mining Company to participate in the stockpiling program was not based upon expectations of anticipated profits from processing the concentrates at some undetermined future time, but was based upon the large profits that Sullivan Mining Company and its affiliates would make from full production, high metal prices and the premium payment on over-quota production, together with the benefits which would inure to the entire Coeur d'Alene Mining District in which Sullivan Mining Company had a vital and far-reaching interest. Mr. Woolf, the Superintendent of Sullivan Mining Company, testified as follows:

“Q. Mr. Woolf, from time to time in the course of this hearing reference will be made to the Bunker Hill and Sullivan Mining and Concentrating Company, what, if any, relation exists between the Sullivan Mining Company and the Bunker Hill and Sullivan Mining and Concentrating Company?”

“A. The Sullivan Mining Company is owned by the Bunker Hill and Sullivan Mining and Con-

centrating Company, and the Hecla Mining Company, each company having a 50% ownership. The Sullivan Mining Company operates the Electrolytic zinc plant, and it also operates its own Star Mine. The management of the zinc plant is under the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company; Mr. Haefner, who is my superior—the operation of the Star Mine is under the management of the Hecla Mining Company” (Tr. 41 and 42).

A little later, we find the following testimony by Mr. Woolf:

“Q. What is the Bunker Hill Smelter?”

“A. The Bunker Hill Smelter is owned by the Bunker Hill and Sullivan Mining and Concentrating Company, which, as I have testified earlier, owns one-half of the Sullivan Mining Company. The Sullivan Mining Company is an affiliate, and Mr. Haefner is the general manager of the Bunker Hill and Sullivan Mining and Concentrating Company, and also of the zinc plant, and the result is that the Bunker Hill Smelter and the zinc plant cooperate very closely, because of the close connection between the two” (Tr. 49).

Keeping in mind the above corporate structures, let us see from the testimony how each was benefited by the Government's over-quota production premium payment and stockpiling program. Mr. Woolf, on cross-examination, testified as follows:

“Q. Yes, tell me if you can what mines besides your mine or mines operated by you, or in which

the Sullivan Mining Company had a financial interest, were shipping to this stockpile?"

"A. To my recollection, the only mine the Sullivan Mining Company was interested in financially was its Star Mine that is owned and operated by the Sullivan Mining Company."

"Q. There were concentrates shipped to that stockpile that came out of Bunker Hill and Sullivan Mine?"

"A. Yes, we treat and process these zinc concentrates from the Bunker Hill and Sullivan Mine."

"Q. And there were concentrates that went into stockpile that came from the Hecla?"

"A. The Hecla Mining Company, as a result of the premium price plan, processed tailings that had been lying for many years in the Coeur d'Alene River Valley—these concentrates, i.e., the concentrates resulting from the tailing treatment, were also sold to the Sullivan Mining Company and shipped to the stockpile" (Tr. 130-131).

It appears self-evident that if appellant has shown that the Star Mine, owned and operated by Sullivan Mining Company, was receiving substantial benefits by virtue of the Government's stockpiling and premium payment program, then an independent consideration entirely unrelated to any benefits that might be derived from processing would be established to support the Original Letter Agreement and Amendatory Agreement (Plaintiff's Exhibits Nos. 3 and 6).

In this connection it was established through defendant's Exhibit No. 30 and testimony by Mr. Woolf (Tr. 133, 134, 135) that out of a total of 72,000 tons put into stockpile for Metals Reserve Company, 51,000 tons were produced by the Star Mine, owned and operated by the Sullivan Mining Company. In addition thereto, Sullivan Mining Company processed, and did not put into the Metals Reserve Company stockpile, 82,898.9225 tons of Star Mine concentrates and 40,132 tons of Bunker Hill concentrates between June, 1942, and November, 1946, inclusive (Tr. 140). Add this testimony to that of defendant's Exhibit No. 31 which shows that during the last six months of 1943, the Star Mine had an over-quota premium production of nearly three and one-half million pounds of zinc (Tr. 141) and we can reach but one conclusion, namely, that there was an ample consideration to support both the original Letter Agreement and Amendatory Letter Agreement (Plaintiff's Exhibits Nos. 3 and 6), irregardless of where the concentrates were processed.

It should also be borne in mind (Tr. 137, 138, 139, Exhibit No. 9) that the Sullivan Mining Company was continually requesting Metals Reserve Company to increase the stockpile limits, until the authorization reached the maximum of 80,000 tons. It appears strange that these requests would have been so persistently made if Sullivan Mining Company was depending for reimbursement only if it could repurchase and

process the stockpiled concentrates at some undetermined future date. Appellee's contention seems especially out of line in view of the testimony that Sullivan Mining Company, at the time the requests were made, did not have the capacity to process any of the stockpiled concentrates whatsoever. The more likely explanation seems to be that Sullivan Mining Company and its parent organization, the Bunker Hill and Sullivan Mining and Concentrating Company, were anxious

First:

To properly service the Coeur d'Alene mining district for which they would be dependent for future business after the cessation of hostilities.

Second:

To keep its Star and Bunker Hill Mines producing at full capacity and obtain the advantages of premium payments and high metal prices.

The concern which Sullivan had for the small shipper or small producer and, I am sure that it was not based on purely philanthropic motives, is indicated in Mr. Woolf's direct testimony (Tr. 82-83).

"Q. At about that time, or shortly thereafter, in 1948, were any other concentrates shipped out to the Anaconda Copper Mining Company?"

"A. After the termination, after we could no longer store for the Metals Reserve account there was a large tonnage of zinc concentrates offered to us in excess of our capacity to treat and by ar-

arrangement with the shippers, we received as much from them as we possibly could and the balance we put in a stockpile, which we called the shippers stockpile and we made arrangements to ship that stockpile to the Anaconda under contract. We paid the shippers to us, the same amount as we received from the Anaconda except that we absorbed the freight from Bradley, the site of the stockpile to the Anaconda Company something like \$6.00 per ton. We paid that."

"Q. Was the amount of the shipment that you were then receiving from the shippers in excess of your own smelting capacity and in excess of the amount that go into the government stockpile monthly?"

"A. Yes, as I recall we shipped in excess of 11,000 tons to the Anaconda Company. That was in addition to and had nothing to do with the 17,500 tons that we shipped from the Metals Reserve stockpile."

"The 11,000 tons was not concentrates of the Reconstruction Finance Corporation?"

"A. No."

"Q. Were they concentrates you yourself, that is, your company had purchased?"

"A. We purchased them by agreement with the Producers, with the understanding that we would be able to dispose of them to the Anaconda Company and we did dispose of them to the Anaconda Company. *The object was to maintain the mines in production*" (Emphasis ours).

“Q. You were not stockpiling any concentrates for the Reconstruction Finance Corporation at that time?”

“A. No, sir” (Tr. 82, 83).

From the foregoing, it is apparent that, even after the stockpiling agreement with the government ceased, Sullivan not only continued on its own volition to stockpile for the benefit of its various shippers but also absorbed the costs of shipping from Bradley to the Anaconda Smelter.

SPECIFICATION OF ERROR No. 7

Respondent, Sullivan Mining Company, attempted to prove by Exhibit No. 25, that the Mining Company, on or about August 25, 1949, offered to purchase the concentrates remaining in the stockpile.

The exhibit is a letter addressed to the Treasury Department, Bureau of Federal Supply, from Sullivan Mining Company. Paragraph three of this letter reads as follows:

"We offered, through Mr. Charles P. Ince, Manager of metal sales of the St. Joseph's Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provisions as set forth in the agreement of June 18, 1942; in fact we made a better offer to you than the one so provided, because we agreed to deliver to you 85% of the contained zinc as compared to the payment of 80% of the zinc content as our present zinc concentrates purchase schedules and contracts provide. Notwithstanding this, we are now advised by Mr. Ince that our offer was rejected by you, although as yet we have had no direct advice from you to this effect. We respectfully request that we have your formal advice on this matter" (Tr. 109).

Objection to the admission of Exhibit No. 25 was promptly made by appellant (Tr. 113). Certainly, this letter standing alone is at best a self-serving declaration. The phraseology—

“We offered through Mr. Charles P. Ince, Manager of St. Joseph’s Lead Company, to commence treatment, etc”;

is pure hearsay, because Mr. Ince was never called as a witness. We cite further from the letter—

“We are now advised by Mr. Ince that our offer was rejected by you, etc”;

This statement certainly cannot be properly used as evidence when appellant had no opportunity to examine Mr. Ince concerning the purported offer and rejection. The objection of appellant to the admission of Exhibit No. 25 as evidence should have been upheld by the Court.

The District Court must have given Exhibit No. 25 great weight even though it amounted to no more than a self-serving declaration because, in making Finding of Fact No. XVII (Tr. 27), the Court said:

“Plaintiff offered to purchase these remaining concentrates, but its offer was not accepted.”

We feel that no more need be said concerning the incompetency of the testimony upon which this Finding is based. There is no other testimony in the record that the Sullivan Mining Company ever agreed to purchase the concentrates.

It must be borne in mind that appellant first requested Sullivan Mining Company to start processing

the stockpiled concentrates in August, 1946 (Exhibit No. 9, Tr. 157), and again in February, 1948, advised Sullivan Mining Company that the Munitions Board had requested that the permanent stockpile be made available to them and that capacity for treatment of the concentrates was available at other smelters if Sullivan Mining Company could not process the same (Exhibit No. 11, Tr. 72).

OTHER HEARSAY TESTIMONY

The District Court permitted the introduction of Exhibit No. 21, being a letter addressed to Sullivan Mining Company, together with Contract embodying an agreement Between the Bureau of Federal Supply, Treasury Department, and the Sullivan Mining Company, covering the stockpile after Reconstruction Finance Corporation had assigned all of its rights in the original stockpiling agreements to the Bureau of Federal Supply, Treasury Department. This Contract was never executed and for this reason is incompetent, irrelevant and immaterial and being a Contract drawn by the Bureau of Federal Supply and not by Reconstruction Finance Corporation would constitute hearsay testimony insofar as appellant is concerned. The same objection applies to Exhibit No. 23 (Tr. 104).

EFFECT OF ASSIGNMENT FROM RECONSTRUCTION FINANCE CORPORATION TO UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF FEDERAL SUPPLY

Appellant believes that one further observation should be made. Without conceding, in any manner, that Sullivan Mining Company is entitled to any reimbursement whatsoever for the costs of establishing and maintaining the stockpile, it is submitted that in any event, Reconstruction Finance Corporation, the

Defendant below, and Appellant herein, could only be liable for the 19,224 tons of zinc concentrates removed by it previous to December 1, 1948, in which Plaintiff seeks recovery of \$14,595.39. The Amendatory Letter Agreement made July 12, 1944 (Plaintiff's Exhibit No. 6), provided, among other things:

"Metals Reserve may assign its interest under this contract to any other branch or agency of the Government of the United States of America, and upon such assignment such assignee shall acquire all the rights, powers and privileges of Metals Reserve hereunder, and shall be bound by all the duties and obligations of Metals Reserve hereunder, and Metals Reserve shall thereby cease to have any rights, powers, privileges, duties or obligations hereunder, it being expressly understood that any such assignment by Metals Reserve of its interest in this contract shall be subject to all the rights, powers and privileges of contractor hereunder and shall be conditioned upon such assignee's assuming all duties and obligations of Metals Reserve hereunder."

By virtue of the above provision the contract as amended, was assigned to the Bureau of Federal Supply November 30, 1948 (Plaintiff's Exhibit No. 22). This assignment provided:

"It being expressly understood and agreed that said assignee shall hereby acquire all the rights, powers and privileges of assignor under said agreement as amended and shall be bound by all the duties and obligations of assignor under said agreement as amended and assignor shall hereby cease

to have any rights, powers, privileges, duties or obligations under said agreement as amended.”

As set forth on page 115 of the Transcript, Appellee’s attorney made the following observation to the Court:

“Our point is that the stockpiling costs were out-of-pocket but the liability did not accrue until the concentrates were removed because no one knew at that time or until then how many were going to be removed.”

It seems clear, therefore, that by virtue of the assignment (Exhibit No. 22), all concentrates removed after November 30, 1948, became the responsibility of the Bureau of Federal Supply and the responsibility of appellant, if any, ceased as of that date.

The Bureau of Federal Supply is an arm of the Treasury Department of the United States Government and has not been made a party to this action. It seems inconceivable that even though liability had existed prior to November 30, 1948, that Reconstruction Finance Corporation could be held liable for concentrates removed subsequent to the assignment of the contract to the Bureau of Federal Supply (Treasury Department), on November 30, 1948.

We call attention to Defendant’s Exhibit No. 35, which is a letter addressed to the Sullivan Mining Company by appellant, dated November 9, 1948, and approved by Sullivan Mining Company November 15,

1948, by W. G. Woolf. Paragraph 2 provides as follows:

“Accordingly, you are requested to accept this letter as a release of all material remaining in stockpile to Treasury Department, Bureau of Federal Supply, effective as of the close of business November 30, 1948. In accordance with the above, all charges incurred in connection with this material will be for the account of and you will bill such charges to Bureau of Federal Supply effective as of December 1, 1948. Our legal division is arranging to assign the underlying contract involved in this storage operation.”

It is evident therefor that Sullivan Mining Company not only had notice that the responsibility of appellant ceased on November 30, 1948, but also approved and confirmed the arrangement whereby the Bureau of Federal Supply was substituted as a new debtor in place of appellant.

4-American Jurisprudence, ASSIGNMENTS, Page 233, has this to say:

“At the outset, it should be noted that a party to a contract may not assign an obligation so as to avoid liability thereon and shift liability to the assignee, only rights under a contract can be assigned. It is otherwise, of course, where the assignee assumes the obligation of the assignor with the consent of the other party to the contract and the latter releases the assignor from further liability; *in such case there is a novation.*”

(See 20 R. C. L., P. 359.)

In 66-C. J. S.—NOVATION—Page 682, we find the following :

METHODS OF NOVATION

“The Courts have frequently recognized that a novation may be effected by the substitution of a new obligation between the same parties with intent to extinguish the old obligation, or a new debtor in the place of the old debtor, with intent to release the latter, or of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.”

In *Moers vs. Moers*, 14 A. L. R., 225-229 N. Y. 294; 128 NE 202, the Court says:

“A new executory agreement, whether performed or not, may be accepted in satisfaction of a previous obligation or liability; and if it is so accepted, the remedy for breach thereof is upon the new, and not the old agreement.”

In *Wanamaker vs. Comfort*, 53 Fed. (2) 751, A. L. R. 133, the Court makes this observation:

“Novatation is to be determined by ascertaining the intent of the parties from the evidence in each particular case.”

In *Watts vs. Smith*, 91 A. L. R. 1206, 63 SW (2) 796, it is stated that:

“The assent necessary to effect a novation need not be in express words, but may be implied from circumstances and subsequent conduct of the parties.”

CONCLUSION

FIRST: Judgment should have been granted appellant in the District Court because under the original Letter Agreement as amended, there was no contractual obligation entered into whereby appellant agreed to reimburse Sullivan Mining Company for the costs of establishing and maintaining the stockpile.

SECOND: That if any legal liability did exist against Reconstruction Finance Corporation then it should be limited to the sum of \$14,595.39 for concentrates removed from the stockpile previous to the assignment of the contract by Reconstruction Finance Corporation to the Bureau of Federal Supply (Treasury Department), which assignment was approved and accepted by the Sullivan Mining Company.

Respectfully submitted,

STIMSON & DONAHUE,
L. VINCENT DONAHUE,
421 Symons Building,
Spokane, Washington.

TOM B. PAINE,
Wallace, Idaho,

Attorneys for Appellant.

IN THE
UNITED STATES
COURT of APPEALS
FOR THE NINTH CIRCUIT

RECONSTRUCTION FINANCE CORPORATION,
a corporation, *Appellant.*

vs.

SULLIVAN MINING COMPANY,
a corporation, *Appellee.*

APPELLEE'S BRIEF

*Upon Appeal from the District Court of the
United States for the District of Idaho
Northern Division*

CHAS. E. HORNING,
Wallace, Idaho

ROBERT E. BROWN,
Kellogg, Idaho.

Attorneys for Appellee

FILED

AUG 31 1955



SUBJECT INDEX

	Pages
Statement of the case	1
Summary of points in argument	2
Argument	5

1. The original contract of June 18, 1942, between Metals Reserve Company (Reconstruction Finance Company) and the Respondent, Sullivan Mining Company contemplated that all concentrates which should be stockpiled by Respondent would be sold back to and processed by Respondent at such time or times as Respondent should have sufficient smelter capacity available over and above that required for the processing of its normal intake of concentrates, and it was with this understanding that Respondent agreed to bear stockpiling expense 7, 8, 9

2. The July 12, 1944, amendment of the original contract provided that Appellant should have the right to remove from the stockpiles any part or all of the concentrates and ship and sell the same to other smelters but that in the event of its so doing it would reimburse the Respondent for all out-of-pocket expense incurred by Respondent in stockpiling the concentrates which should be so removed and sold 11 to 20, 24 to 32

3. The Respondent's approval of the Appellant's transfer of the physical custody of the stockpiled concentrates to the Bureau of Federal Supply on November 9, 1948, was merely an approval of action which the Appellant was authorized to take under the July 12, 1944, amendment of the stockpiling contract and was not an approval of the subsequent assignment of the underlying contract to the Bureau of Federal Supply and was not a release of the Appellant from its obligation to reimburse the Respondent for its out-of-pocket expense incurred in stock-

piling concentrates which had theretofore been or which might thereafter be removed from the stockpiles and shipped to other smelters 17, 33, 34, 35

4. The assignment of November 30, 1948, from the Appellant to the Bureau of Federal Supply was never approved or consented to by the Respondent, and did not have the effect of releasing the Appellant from its obligation under the assigned contract to reimburse the Respondent for its expense incurred in stockpiling either the concentrates which had theretofore been or which might thereafter be removed from storage and shipped to other smelters 35, 43

5. Sullivan Mining Company expended \$2,500,-000.00 in enlarging its smelting plant by adding a fourth electrolytic unit, completing the enlargement in the latter part of 1949, and thus providing sufficient smelting capacity to enable it to process the 48,000 tons of concentrates then remaining in the stockpiles. Sullivan Mining Company then offered to purchase these remaining concentrates from the Government but its offer was ignored and the Government proceeded to remove the concentrates from storage and ship to other smelters 21, 22, 23, 24

6. The Respondent never at any time released the Appellant from its obligations to Respondent under the original contract, as amended on July 12, 1944, and never, expressly or impliedly, agreed to accept the Bureau of Federal Supply as Respondent's debtor 35 to 47

7. Notwithstanding said assignment, the Appellant remained and still remains liable for full reimbursement of the Respondent for all out-of-pocket expenses incurred by Respondent in stockpiling the entire amount of concentrates which were placed in storage by the Respondent, as agent for the Government 35 to 47

TABLE OF AUTHORITIES CITED

Cases	Pages
<i>City National Bank of Huron, South Dakota, et al, v. B. R. Fuller</i> , 52 Fed (2d) 870, 79 A.L.R. 71	38, 39, 40, 41
<i>Colley v. Chowchilla Nat. Bank</i> , 255 Pac. 188, 192	36, 37, 38
<i>Harrison, et al, v. Fregger, et al</i> , 294 Pac. 372	42
<i>Potts, et al, v. Burkett, et al</i> , 278 S. W. 471	43
<i>Southern Pac. Co. v. Butterfield, et al</i> , 154 Pac. 932	41, 42
<i>Walker v. Mills, et al</i> , 78 Pac. (2d) 697	41

TEXT BOOKS

4 <i>American Jurisprudence</i> , Page 233	35
39 <i>American Jurisprudence</i> , Page 264, 265	37

IN THE
UNITED STATES
COURT of APPEALS
FOR THE NINTH CIRCUIT

RECONSTRUCTION FINANCE CORPORATION,
a corporation, *Appellant.*

vs.

SULLIVAN MINING COMPANY,
a corporation, *Appellee.*

APPELLEE'S BRIEF

STATEMENT OF THE CASE

We accept the Appellant's "Statement of the Case" as a correct statement, except that we would change the last sentence in the statement to read as follows:

It also appears that it was the theory of the Trial Court that the Assignment (Plaintiff's Exhibit No. 22) did not relieve Reconstruction Finance Corporation from liability to reimburse Sullivan Mining Company for its out-of-pocket expenses incurred in stockpiling the concentrates which the Government removed from the stockpiles and shipped and sold to other smelters. (Tr. 16, 17, 18).

SUMMARY OF POINTS IN ARGUMENT

1. The original contract of June 18, 1942, between Metals Reserve Company (Reconstruction Finance Company) and the Respondent, Sullivan Mining Company contemplated that all concentrates which should be stockpiled by Respondent would be sold back to and processed by Respondent at such time or times as Respondent should have sufficient smelter capacity available over and above that required for the processing of its normal intake of concentrates, and it was with this understanding that the Respondent agreed to bear stockpiling expense.

2. The July 12, 1944, amendment of the original contract provided that Appellant should have the right to remove from the stockpiles any part or all of the concentrates and ship and sell the same to other smelters but that in the event of its so doing it would reimburse the Respondent for all out-of-pocket expense incurred by Respondent in stockpiling the concentrates which should be so removed and sold.

3. The Respondent's approval of the Appellant's transfer of the physical custody of the stockpiled concentrates to the Bureau of Federal Supply on November 9, 1948, was

merely an approval of action which the Appellant was authorized to take under the July 12, 1944, amendment of the stockpiling contract, and was not an approval of the subsequent assignment of the underlying contract to the Bureau of Federal Supply and was not a release of the Appellant from its obligation to reimburse the Respondent for its out-of-pocket expense incurred in stockpiling concentrates which had theretofore been or which might thereafter be removed from the stockpiles and shipped to other smelters.

4. The assignment of November 30, 1948, from the Appellant to the Bureau of Federal Supply was never approved or consented to by the Respondent, and did not have the effect of releasing the Appellant from its obligation under the assigned contract to reimburse the Respondent for its expense incurred in stockpiling either the concentrates which had theretofore been or which might thereafter be removed from storage and shipped to other smelters.

5. Sullivan Mining Company expended \$2,500,000.00 in enlarging its smelting plant by adding a fourth electrolytic unit, completing the enlargement in the latter part of

1949, and thus providing sufficient smelting capacity to enable it to process the 48,000 tons of concentrates then remaining in the stockpiles. Sullivan Mining Company then offered to purchase these remaining concentrates from the Government but its offer was ignored and the Government proceeded to remove the concentrates from storage and ship the same to other smelters.

6. The Respondent never at any time released the Appellant from its obligations to Respondent under the original contract, as amended on July 12, 1944, and never, expressly or impliedly, agreed to accept the Bureau of Federal Supply as Respondent's debtor.

7. Notwithstanding said assignment, the Appellant remained and still remains liable for full reimbursement of the Respondent for all out-of-pocket expenses incurred by Respondent in stockpiling the entire amount of concentrates which were placed in storage by the Respondent, as agent for the Government.

ARGUMENT

The Appellant concedes that Sullivan Mining Company, as agent for the Reconstruction Finance Corporation, stockpiled 72,263.64 tons of zinc concentrates for the Government (Appellant's Brief, pages 6 and 8) and in so doing actually incurred expenses in the amount of \$54,864.10, that being the exact amount for which this suit was brought. Yet strangely, it seems to us, the Government takes the position that under the contract between the Government and the appellee, the appellee is not entitled to any reimbursement whatsoever.

The original contract between the Government and the appellee, dated June 18, 1942, (Exhibit No. 3) and written entirely by a Government agency, was drafted at a time when this Country was at war and needed for the manufacture of munitions of war more lead and zinc than were then being currently produced. The prices of these metals had been such that many operators of low-grade mines had closed down their operations. The purpose of the Premium Price Plan and the purpose of the stockpiling arrangement made with Sullivan Mining Company, and no doubt with other smelter companies, was, by paying premium prices for lead and zinc, to

encourage and make possible the resumption of production of these metals by companies which had theretofore been unable to operate at the theretofore existing metal prices or which on account of the low prices of these metals had curtailed their operations and were not producing up to their full capacity.

The Sullivan Mining Company, the appellee in this case, owned and operated a zinc smelter at or near Kellogg, Idaho. At this smelter concentrates produced from the Star Mine which was owned by Sullivan Mining Company, were processed and, in addition to processing concentrates produced from ore from its Star Mine, said smelter was processing concentrates from ores produced from about fifteen other mine operators. At the time the original contract between the Government and the appellee was entered into, June 18, 1942, the appellee, Sullivan Mining Company, was operating at its then full capacity and was keeping in its own stockpiles a sufficient reserve of zinc concentrates to insure its uninterrupted operation. At the time this original contract was entered into it was fully known to the Government that Sullivan Mining Company's smelter was already operating at its full capacity and that it could not then handle and process more

zinc concentrates than it was currently receiving. The zinc then being produced by the entire country being insufficient to meet the needs of the Government for its armament purposes, the Premium Price Plan was devised. It was then that the Government conceived the idea of having smelter owners throughout the country, such as Sullivan Mining Company, act as agents for the Government to offer to pay and to pay premium prices for zinc of high or low grade which might be domestically produced.

With full knowledge that Sullivan Mining Company was then operating its smelter at full capacity, the Government drafted and submitted to Sullivan Mining Company a contract which provided that Sullivan Mining Company, as agent for the Government, should purchase for the Government and stockpile all zinc concentrates which it might be able to obtain, offering the premium price therefor. Under the provisions of this agreement, Sullivan Mining Company was to stockpile at its own expense all zinc concentrates which it might purchase as agent for the Government, the Government to advance from time to time to Sullivan Mining Company a sufficient amount of money to cover the actual purchase price of the concentrates

purchased by Sullivan Mining Company as agent for the Government and with the understanding, expressed in the contract, that Sullivan Mining Company would have the privilege and the right to re-purchase said zinc concentrates from the Government and to process the same at its smelter as and when it should have smelting capacity available.

Very strangely, and contrary, we think, to any reasonable interpretation of the contract, the Government seems to be taking the position that it was not the intent of the contract that Sullivan Mining Company was to have the right to treat the concentrates which should be so stockpiled, but that Metals Reserve Company would have had the right at any time to remove the concentrates from the stockpiles and to ship them to other smelters for treatment and that the provision in the contract to the effect that the concentrates were to be stockpiled at Sullivan Mining Company's expense was not inserted in the contract with any understanding that the stockpiled concentrates were to be treated by Sullivan Mining Company. If that was not the understanding and the intent of the original contract, then may we ask why Metals Reserve Company, itself, inserted in the contract the following provision:

“We understand that you desire the material purchased hereunder for our account to be sold to you from time to time as you are able to treat same.”

And why was this provision followed by a lengthy paragraph setting out in detail the method by which the value of the concentrates and the amount to be paid therefor by Sullivan Mining Company was to be determined? (Exhibit No. 3).

And if it was not the understanding of both parties and if it was not the intent of the contract that Sullivan Mining Company was to have the right to treat all of the concentrates which should be stockpiled under the terms of the contract, then what reason could there have been for Metals Reserve Company to draft the amended contract of July 12, 1944, (Exhibit No. 6), to provide that Metals Reserve Company should have the right at its sole option to remove all or any part of the concentrates from the stockpiles and ship and sell the same to other smelters? If, as appellant contends, the Metals Reserve Company already had that right under the original contract of June 18, 1942, then certainly it would have been entirely needless to amend that contract in that regard.

The contract of June 18, 1942, originally provided for the stockpiling of not to exceed 1,500 short tons of concentrates per month and not to exceed 10,000 short tons in all. The evidence showed that the Government's Premium Price Plan so thoroughly accomplished its intended purpose that the number of shippers of zinc concentrates to Sullivan Mining Company's Zinc Plant increased from 15 to 45 or 47 (Tr. pages 45-46; 130), and that the quantity of concentrates being tendered to Sullivan Mining Company, over and above the capacity of its smelting plant, so constantly increased that in order to avoid the curtailment of zinc mining the Government from time to time increased the tonnages which Sullivan Mining Company was authorized to purchase and stockpile for the Government's account. (Exhibit No. 9).

Except for the various modifications of the contract increasing the tonnages of concentrates which Sullivan Mining Company was authorized to purchase and stockpile for Metals Reserve Company, the contract of June 18, 1942, remained in its original form until it was amended, as aforesaid, on July 12, 1944, giving Metals Reserve Company the right to remove from the stockpiles and ship to other smelters for treatment all or any

portion of the concentrates purchased and stored by Sullivan Mining Company for the account of Metals Reserve Company.

The July 12, 1944, amendment of the contract (Exhibit No. 6) provided, in its paragraph number "(2)" that:

"If this company (Reconstruction Finance Corporation) should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)".

With reference to this amendment of the contract Mr. Woolf testified on direct examination (Tr. pages 61-62) as follows:

Q. Mr. Woolf, just prior to the adjournment at lunch time we had introduced in evidence the modification letter from Metals Reserve Company dated July 12, 1944, as Exhibit No. 6. That modification letter, Exhibit No. 6, has a provision in it differing from the original contract of June 18, 1942, in that it provides that the Metals Reserve Company could remove from the stockpile zinc concentrates for processing. I will ask you whether or not, prior to the letter of modification, July 12, 1944, you had any indication from the Metals Re-

serve Company that all or part of these concentrates might be removed for processing elsewhere?

A. No, we did not.

Q. You were aware at the time this modification was executed that there was a provision for allowing the removal of concentrates by the Metals Reserve Company?

A. In the modification, the modification provided for it?

Q. Yes, in the modification?

A. Yes, Sir.

Q. And there was not a similar provision in the original contract?

A. No.

It was very clear from Mr. Woolf's testimony on cross-examination (Tr. pages 148-153; 160-163) that it was Sullivan Mining Company's understanding that under the original contract of June 18, 1942, Sullivan Mining Company was to treat all of the concentrates which should be stockpiled by it under the provisions of that contract and that by reason thereof the concentrates were to be stockpiled at Sullivan Mining Company's expense. It is also clear from Mr. Woolf's testimony on both direct and cross-examination that it was Sullivan Mining Company's understanding that under the amendment of July 12, 1944, Sullivan Mining Company was

to pay the expense of stockpiling all concentrates which should thereafter be treated by Sullivan Mining Company and that Sullivan Mining Company was to be reimbursed for all expenses incurred by it in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment. (Tr. pages 160-164). (Exhibits Nos. 23, 24, 25).

There is nothing in the evidence which would indicate or even suggest that there was any different understanding upon the part of the Government at the time the June 18, 1942, contract was drafted or at the time the amendment of July 12, 1944 was drafted. We are willing to concede that both the original contract and the amendment thereof could and should have been made more definite and certain but it is inconceivable to us that either the original contract or the amendment thereof would have been drafted by the Government with the deliberate intention of making either of them so indefinite and uncertain that the Government could later place an interpretation upon these contracts which would be contrary to the understanding of the parties at the time the contracts were executed.

We would be reluctant to believe that at

the time the Government's draftsmen who inserted in the amended contract the paragraph which we have quoted from Exhibit No. 6 intended to trick the Sullivan Mining Company into an agreement with a hidden meaning to the effect that if these concentrates should be removed from the stockpiles and not processed by Sullivan Mining Company, Sullivan Mining Company would be entitled to no reimbursement whatsoever for the expenses which they had incurred in stockpiling the concentrates but would be entitled only to reimbursement for expenses which Sullivan Mining Company might incur in loading out the concentrates for shipment to some other smelter that would make the only profit to be made in processing the concentrates and reducing them to metallic form. It would require an unrealistic stretch of imagination to conceive of Sullivan Mining Company's entering into either the original contract of June 18, 1942, or the amendment of July 12, 1944, not only with no thought of some profit to itself, but with not even any assurance that, without any profits to itself, it would have no right to reimbursement for its actual out-of-pocket expenses in stockpiling these concentrates in the subsequent treatment of which its competitors might

make the entire profit and it would be only by a like stretch of imagination that anyone could conceive of the United States having even the faintest thought of asking the Sullivan Mining Company to do any such thing.

The Government's stockpiling program was terminated on June 30, 1947, and no concentrates were stockpiled for the Government after that date.

No portion of these concentrates was withdrawn from the stockpiles for processing by Sullivan Mining Company. Under its contract with the Government, Sullivan Mining Company was required to operate its smelter "at the highest possible rate and to maintain in stockpile at all times not less than 10,000 short tons of zinc concentrates or a quantity thereof equivalent to six weeks' supply" for its own account. The contract (Exhibit No. 3) provided in effect that Sullivan Mining Company was not expected to process any of the Government's concentrates until such time or times as Sullivan Mining Company's own stockpile should contain less than the minimum of 10,000 tons. The idea back of the whole stockpiling program and the Premium Price Plan was to increase the mining of zinc ores and to keep the zinc smelters running at full capacity. So long as the Govern-

ment got the metallic zinc which it needed it was of no importance whether the zinc came out of the Government's stockpiles or whether it came out of the stockpiles which the smelters maintained for their own account.

The evidence in this case showed that Sullivan Mining Company made every possible effort to keep its smelting plant running at full capacity, and that at times it endeavored to overcome the labor shortage by employing women on manual labor jobs, and by employing Italian internees, and coal miners who had been released from the army to work in the metal mines. (Tr. 65-66).

It was not until after the termination of the stockpiling program that the Government indicated that it was considering shipping to other smelters the concentrates which had been stockpiled by Sullivan Mining Company for the Government. (Exhibit No. 11 — a letter from the Reconstruction Finance Corporation, dated February 19, 1948). In Sullivan Mining Company's reply to that letter, as well as in subsequent letters to the Reconstruction Finance Corporation, Sullivan Mining Company insisted that under its contract with the Government it was entitled to reimbursement for the expense which it had incurred in constructing and maintain-

ing the storage bins in which the Government's concentrates were stockpiled and for the expense which had been incurred in unloading the concentrates from the railroad cars or trucks into the bins. (Exhibits 13, 17, 23; Tr. 160, 161, 163, 164).

On October 22, 1948, the Reconstruction Finance Corporation advised Sullivan Mining Company that Reconstruction Finance Corporation was turning the physical custody of its remaining stockpiled concentrates over to the Bureau of Federal Supply, effective at the end of business on October 31, 1948. (Exhibit No. 17). Mr. Woolf replied to that letter and again insisted that Sullivan Mining Company be reimbursed for its out-of-pocket expenses incurred in stockpiling the concentrates (Exhibit No. 17).

The date on which the physical custody of the remaining concentrates was transferred to the Bureau of Federal Supply was subsequently set up to December 1, 1948. (Exhibit No. 18).

On February 3, 1949, the Bureau of Federal Supply wrote Sullivan Mining Company, enclosing three copies of a proposed new contract covering the handling of the concentrates which still remained in the stockpiles.

(Exhibit No. 21). Paragraph 6 of this proposed contract reads as follows:

“There shall be no charge to the Government for storage. However, if the concentrates are ordered shipped to another location, the Government will reimburse the Contractor at the rate of 85c per ton for unloading and handling inbound to the storage site including the furnishing of weight certificates and 60c per ton for the handling, loading and weighing same outbound from the storage site in accordance with good commercial practice.”

As a part of Exhibit No. 23 there is a letter from Sullivan Mining Company to the Bureau of Federal Supply, acknowledging receipt of the three copies of the proposed new contract. One paragraph of this letter reads as follows:

“It is our interpretation of this contract that the Government is willing to reimburse us for the in-handling which was incurred on such material and which has recently been shipped out and that we presume that this applies not only to the material that will be shipped out from now on but also to the material that was shipped out from the stockpile during 1948.”

In reply to this the Bureau of Federal Supply wrote Sullivan on March 15, 1949:

“In reference to paragraph number 2 of your letter the interpretation is correct, except that all charges incident to storage

and handling of this material in and out of storage on and after December 1, 1948, are for the account of Bureau of Federal Supply." (Exhibit No. 23).

Answering this, Sullivan wrote the Bureau of Federal Supply on March 24, 1949:

"With reference to paragraph 2 of your letter, we incurred charges incident to storage and handling of this material prior to December 1, 1948, as well as after December 1, 1948. When the Bureau of Federal Supply took over the assets of the Reconstruction Finance Corporation it also took over its liabilities and obligations. By the statement referred to in your letter you have agreed on the principle but applying it only after December 1, 1948. This same principle should apply also for the expenses incurred by this company prior to December 1, 1948." (Exhibit No. 23).

There appears to have been no further correspondence upon this subject until the Bureau of Federal Supply wrote Sullivan Mining Company on June 23, 1949, (Exhibit No. 24) as follows:

"Reference is made to your letter of March 24, 1949, relative to storage and handling charges under the subject contract.

"It is the intent of the contract that you will be paid for unloading and handling inbound, and handling, loading and weighing outbound, in accordance with the terms and conditions of the contract, for all ma-

terials to be shipped to another location on or after December 1, 1948.

"The subject of liability for such charges for material which was shipped out prior to December 1, 1948, is still a matter of dispute between the Reconstruction Finance Corporation and this Bureau. It is anticipated that a settlement will be reached in the near future, and you will be promptly advised as to the Government Agency liable for such claims."

Then on August 9, 1949, the Bureau of Federal Supply again wrote Sullivan Mining Company (Exhibit No. 24) :

"By letter dated June 23, 1949, you were advised that the subject of liability for charges for material shipped out prior to December 1, 1948, was a matter of discussion between this Bureau and the Reconstruction Finance Corporation.

"All questions arising out of such discussions have now been settled and it has been determined that, as expressed in previous letters, this Bureau will not be liable for charges for material shipped to another location prior to December 1, 1948. Claims representing any such charges are properly for consideration by the Reconstruction Finance Corporation and the contract which has been forwarded to you is designed to cover contractual relationships between your company and the Bureau of Federal Supply from the period beginning December 1, 1948. (Emphasis, ours).

"It is hoped that in the light of the above information you will see your way clear to

executing the contracts previously mailed to you. If such is the case, the procedure outlined in our letter dated February 3, 1949, should be followed in the execution thereof."

On August 25, 1949, Sullivan Mining Company wrote to the Bureau of Federal Supply, in part as follows (Exhibit No. 25) :

"This is written in answer to your letter of August 9, 1949, concerning contract SCM-TS-12755. Reference is also made to your letter of February 3, 1949, enclosing copies of this contract and other correspondence on this subject.

"In our original agreement with Metals Reserve Company of June 18, 1942, and subsequent renewals of this agreement we undertook to purchase for the account of Metals Reserve Company zinc concentrates tendered to us in excess of our processing capacity and to stockpile them. The same contract provided for our repurchasing all or part of this material from time to time as we were able to treat same. It was with this commitment that we agreed to provide storage and to stockpile at our expense.

"We offered through Mr. Charles M. Ince, Manager of Metal Sales of the St. Joseph Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provision as set forth in the agreement of June 18, 1942; in fact, we made a better offer to you than the one so provided because we agreed to deliver to you 85% of the con-

tained zinc as compared to the payment of 80% of the zinc content as our present zinc concentrate purchase schedules and contracts provide. Notwithstanding this we are now advised by Mr. Ince that our offer was rejected by you although as yet we have had no direct advice from you to this effect. We respectfully request that we have your formal advice on this matter.

“Under the conditions above stated we therefore do not feel in a position to execute the contract as far as it pertains to the loading and shipment of your concentrates.”

No denial was made of the fact that such an offer was made by Sullivan Mining Company through Mr. Ince. If no such offer was made, certainly the Government would have replied to Sullivan Mining Company's letter of August 25, 1949, and would in such reply have denied that such an offer was made. But the evidence showed that the Government made no reply of any kind to this letter. (Tr. 112).

In their brief Counsel for Appellant complain that the District Court erred in admitting in evidence Exhibit No. 25 over Appellant's objection that this Exhibit was hearsay and a self-serving declaration.

Exhibit No. 25 was a copy of a letter written by Sullivan Mining Company to the Gov-

ernment and its receipt by the Government was not denied and neither was it denied that the letter was never answered. We submit that this letter itself constituted an offer by Sullivan Mining Company to purchase the 48,000 tons of concentrates which then remained in storage regardless of whether Mr. Ince ever did make the offer on behalf of Sullivan Mining Company.

The fact that the Government declined Sullivan Mining Company's offer to purchase and treat the concentrates that then remained in stockpile is evidenced by the fact that the Government went right ahead and removed the balance of the concentrates and shipped them elsewhere for processing. (Tr. pages 117, 118).

The reason why Sullivan Mining Company would have been able on or after August 25, 1949, to process the Government's concentrates which then remained in stockpile appears from Mr. Woolf's testimony (Tr. page 117) :

Q. Mr. Woolf, earlier in your testimony and in one of the exhibits, it became apparent that Reconstruction Finance Corporation had in 1946 requested you to process a portion of the stockpiles and at that time you had not had adequate facilities and you gave certain reasons in your testi-

mony, I believe, with respect to manpower and, in fact, you, at one time, had to shut down one of the units, I believe. At the time that you offered to purchase the remaining part of the stockpile in 1949, as evidenced in Exhibit No. 25, had there been some change in your condition or your facilities?

A. Yes, as I testified earlier, our zinc plant in those earlier years consisted of three electrolytic units. In the years subsequent to that we added an additional fourth electrolytic unit with necessary auxiliary enlargement of the remaining parts of the plant so that late in 1949 we had four units and the plant was correspondingly enlarged. The cost of that unit, the fourth unit, was somewhere in the range of two and a half million dollars.

Q. Did that put you in a position to handle these concentrates at the time this offer was made?

A. Yes.

On February 17, 1950, Mr. Woolf, Superintendent of Sullivan Mining Company's zinc smelter, and Mr. J. B. Haffner, General Manager of the smelter, attended two conferences in Washington in an endeavor to settle Sullivan Mining Company's claim which is the subject matter of the present suit. One of these conferences was in the offices of the Bureau of Federal Supply and the other conference was in the offices of the Reconstruc-

tion Finance Corporation. (Tr. pages 168-169). Mr. Woolf testified that at the earlier of these two conferences he and Mr. Haffner were advised by the Bureau of Federal Supply that that Bureau would be willing to pay the expense incurred by Sullivan Mining Company in stockpiling all of the concentrates which were removed from the stockpiles and shipped out subsequent to December 1, 1948. At this conference the Bureau of Federal Supply requested Mr. Woolf to prepare an itemized statement of Sullivan Mining Company's entire claim. Having been assured by the Bureau of Federal Supply that that Bureau would be willing to pay the portion of the expense which we have already mentioned, Mr. Haffner and Mr. Woolf went to the offices of the Reconstruction Finance Corporation for the second of the two conferences. Their purpose in conferring with the Reconstruction Finance Corporation was to inquire whether that agency would be willing to pay the balance of Sullivan Mining Company's claim over and above the portion of the claim which the Bureau of Federal Supply had indicated their willingness to pay. The total amount of Sullivan Mining Company's claim, being the amount for which this suit was brought, was discussed at both conferences. Mr. Woolf testified that following

mony, I believe, with respect to manpower and, in fact, you, at one time, had to shut down one of the units, I believe. At the time that you offered to purchase the remaining part of the stockpile in 1949, as evidenced in Exhibit No. 25, had there been some change in your condition or your facilities?

A. Yes, as I testified earlier, our zinc plant in those earlier years consisted of three electrolytic units. In the years subsequent to that we added an additional fourth electrolytic unit with necessary auxiliary enlargement of the remaining parts of the plant so that late in 1949 we had four units and the plant was correspondingly enlarged. The cost of that unit, the fourth unit, was somewhere in the range of two and a half million dollars.

Q. Did that put you in a position to handle these concentrates at the time this offer was made?

A. Yes.

On February 17, 1950, Mr. Woolf, Superintendent of Sullivan Mining Company's zinc smelter, and Mr. J. B. Haffner, General Manager of the smelter, attended two conferences in Washington in an endeavor to settle Sullivan Mining Company's claim which is the subject matter of the present suit. One of these conferences was in the offices of the Bureau of Federal Supply and the other conference was in the offices of the Reconstruc-

tion Finance Corporation. (Tr. pages 168-169). Mr. Woolf testified that at the earlier of these two conferences he and Mr. Haffner were advised by the Bureau of Federal Supply that that Bureau would be willing to pay the expense incurred by Sullivan Mining Company in stockpiling all of the concentrates which were removed from the stockpiles and shipped out subsequent to December 1, 1948. At this conference the Bureau of Federal Supply requested Mr. Woolf to prepare an itemized statement of Sullivan Mining Company's entire claim. Having been assured by the Bureau of Federal Supply that that Bureau would be willing to pay the portion of the expense which we have already mentioned, Mr. Haffner and Mr. Woolf went to the offices of the Reconstruction Finance Corporation for the second of the two conferences. Their purpose in conferring with the Reconstruction Finance Corporation was to inquire whether that agency would be willing to pay the balance of Sullivan Mining Company's claim over and above the portion of the claim which the Bureau of Federal Supply had indicated their willingness to pay. The total amount of Sullivan Mining Company's claim, being the amount for which this suit was brought, was discussed at both conferences. Mr. Woolf testified that following

the conference with the Bureau of Federal Supply "we went to the Reconstruction Finance Corporation office and there we were rebuffed for their portion and were told that they would not pay." (Tr. pages 168-169).

Upon Mr. Woolf's return home he wrote a letter dated March 4, 1950, (Exhibit No. 28) to the Bureau of Federal Supply in which he reviewed certain correspondence which had passed between Sullivan Mining Company and the Bureau of Federal Supply and in which he enclosed an itemized statement of Sullivan Mining Company's entire claim, this being the statement which at his conference with the Bureau of Federal Supply he had been requested to submit. On March 1, 1950, and without waiting for the statement which Mr. Woolf had been requested to submit and contrary to the offer of the Bureau of Federal Supply to pay a portion of Sullivan Mining Company's claim, a J. E. Salisbury who represented himself to be Chief of the Storage and Transportation Division, General Services Administration, Federal Supply Service, Strategic and Critical Materials Branch, wrote a letter to Sullivan Mining Company (Exhibit No. 29) in which, after referring to Mr. Woolf's and Mr. Haffner's conferences in Washington on February 17, 1950, he said:

“After thorough examination and review, it is our considered opinion that there is no liability on our part under the contract in regard to unloading expenses. We base this opinion on the following:

- (1) The original contract provided that your company should bear the expense of stockpiling.
- (2) The Amendment of July 12, 1944, limited reimbursement in the event the concentrates were shipped elsewhere to the cost of removal.”

It is true, as stated in Mr. Salisbury's letter, that the original contract of June 18, 1942, provided that Sullivan Mining Company should bear the expense of stockpiling and that Sullivan Mining Company agreed so to do, expecting that it would process the concentrates at its own smelter.

But we submit that it is not true that the amended contract of July 12, 1944, limited Sullivan Mining Company's reimbursement to expenses which it might incur in connection with the removal of the concentrates from the stockpiles for shipment to other smelters.

The amended contract (Exhibit No. 6) provided for two different bases for settlement between the Government and Sullivan Mining Company — one with respect to concentrates which should be sold back to Sul-

livan Mining Company, and the other with respect to concentrates which should be removed from the stockpiles for shipment and sale to other smelters.

Paragraph (1) of the amended contract provided that:

“In the event of any sale of such material to you, the inbound weights and assays as agreed upon between you and the producer of the material at the time of your purchase thereof for this Company’s account shall govern in settlement with this Company.”

In other words, if any of the concentrates were to be sold to Sullivan Mining Company, then Sullivan Mining Company would, as provided in the original contract, bear the cost of stockpiling the material which should be sold to it just as if it had purchased and stockpiled such concentrates for its own account in the first place and the settlement with the Government would be based entirely upon weights and assays and prevailing market prices and would not involve any stockpiling costs.

But the settlement was to be otherwise with respect to concentrates which should be removed from the stockpiles for sale to other parties. This was covered by paragraph (2)

of the amended contract which provided that:

“If this Company should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i. e. the tonnage removed, weighed and handled).”

We submit that any fair and sensible interpretation of this provision would necessarily be that if any of the material in the stockpiles should be removed for sale to other smelters, the Sullivan Mining Company was to be reimbursed for its “*actual out-of-pocket expenses incurred in connection therewith*” which would include its cost of stockpiling, but that its reimbursement was to be limited to expense incurred in connection with the material which should be removed and not sold to Sullivan Mining Company.

And what reason could there have been for Sullivan Mining Company to expend out of its own pocket the sum of \$54,864.10, or any other amount, in constructing bins and stockpiling concentrates to be processed by other smelters, and under a contract which, as the Government now contends, provided

that Sullivan Mining Company would be entitled to no reimbursement for this expenditure?

Counsel for Appellant has found in Words & Phrases that the word "*therewith*" means "*with that or this.*" But we submit that as the word "*therewith*" is used in paragraph (2) of the amended agreement it was not intended to and could not have any such meaning. That would have been no meaning at all.

And may we ask *when* the Government decided that the amendment of July 12, 1944, "limited reimbursement in the event the concentrates were shipped elsewhere to the cost of removal"? If that was the intent of the agreement on March 1, 1950, when Mr. Salisbury wrote his above mentioned letter to Sullivan Mining Company (Exhibit No. 29), then that must have been the intent of the agreement on June 23, 1949, when the Bureau of Federal Supply wrote the letter to Sullivan Mining Company (Exhibit No. 24) in which Sullivan was advised that—

"The subject of liability for such charges for material which was shipped out prior to December 1, 1948, is still a matter of dispute between the Reconstruction Finance Corporation and this Bureau. It is anticipated that a settlement will be reached in the near future, and you will be

promptly advised as to the Government Agency liable for such claims." (The reference in this paragraph being to Sullivan Mining Company's claim for reimbursement for stockpiling expenses).

And if at that time the intent of the agreement was that Sullivan Mining Company was not entitled to any reimbursement for stockpiling these concentrates why would it have been a matter of dispute between the Bureau of Federal Supply and the Reconstruction Finance Corporation as to which of these two governmental agencies was liable for the reimbursement of Sullivan Mining Company for its stockpiling expense? And if on March 1, 1950, when Exhibit No. 29 was written the intent of the agreement was that Sullivan Mining Company was not entitled to reimbursement for any of the expenses incurred by it in stockpiling these concentrates that must have been the intent of the agreement on August 9, 1949, when the Bureau of Federal Supply wrote Sullivan Mining Company (Exhibit No. 24) advising Sullivan Mining Company that the aforesaid dispute between the Bureau of Federal Supply and the Reconstruction Finance Corporation had been settled and that it had been determined by these two agencies that Sullivan Mining Company's claim was against the Reconstruct-

tion Finance Corporation for expenses incurred by Sullivan Mining Company in stockpiling all concentrates which were removed from the stockpiles prior to December 1, 1948.

And if it was the intent of the amendment that Sullivan Mining Company was not entitled to any reimbursement for expenses incurred by it in stockpiling these concentrates, may we ask why the Government did not take that position at the Government's conferences with Mr. Woolf and Mr. Haffner in Washington on February 17, 1950?

It appears from Mr. Salisbury's letter of March 1, 1950, to Sullivan Mining Company (Exhibit No. 29) that one of the above mentioned conferences was held in Mr. Salisbury's office. It seems strange that he not only did not at that conference place the interpretation on the amended agreement that he placed on it in his letter of March 1, 1950, but that he asked Mr. Woolf to send him an itemized statement of Sullivan Mining Company's entire claim.

We submit that the interpretation which Mr. Salisbury in his letter of March 1, 1950, placed on the amended agreement was an after-thought.

If, as we contend, the amended contract of July 12, 1944, between the appellant, Reconstruction Finance Corporation, and the appellee, Sullivan Mining Company, obligated the appellant to reimburse appellee for the latter's expense incurred in stockpiling all concentrates which appellant should thereafter remove from the stockpiles and ship to other smelters, then this obligation remained the obligation of the appellant notwithstanding the assignment of the contract to the Bureau of Federal Supply.

Let us not confuse the transfer of the physical custody of the stockpiled concentrates from appellant to the Bureau of Federal Supply (Plaintiff's Exhibit No. 18; Defendant's Exhibit No. 35 — a letter dated November 9, 1948, from the appellant to appellee) with the subsequent assignment of the underlying contract to the Bureau of Federal Supply. This letter was not and did not purport to be an assignment of the contract. It was captioned "Re: Transfer of Physical Custody of RFC Stockpiles — Zinc Concentrates to Bureau of Federal Supply," and the body of the letter conformed with its caption. The appellant having the right under the July 12, 1944, amendment to sell the concentrates and to transfer the physical

custody thereof to any third party to whom it might wish to sell the same, the letter of November 9, 1948, (Exhibits 18 and 35) might just as well have advised the appellee that the physical custody of the concentrates was being transferred to Anaconda Copper Mining Company and that the appellee should bill the latter company for all "charges incurred in connection with this material." If such had been the case, would Counsel for appellant contend that the effect of the letter was to release the appellant from its obligation to reimburse the appellee for its stockpiling expense and to substitute, as its debtor, the Anaconda Copper Mining Company? Or that if the appellee, assenting to such arrangement, had thereafter billed the Anaconda Copper Mining Company for appellee's stockpiling expense and payment had been refused, the appellee would have had recourse against the Anaconda Copper Mining Company and no recourse against the appellant? In order to sustain the argument found on pages 41 and 42 of appellant's brief both of these questions would have to be answered in the affirmative.

The letter of November 9, 1948, from appellant to appellee advised the appellee that appellant's "legal division is *arranging to as-*

sign the underlying contract involved in this storage operation.” That made it clear that said letter was not intended as an assignment and that the appellee’s approval of the *transfer of the physical custody* of the stock-piled concentrates to the Bureau of Federal Supply was not the approval of a not-yet-drafted assignment of the underlying contract.

The assignment, thereafter drafted by the appellant itself without any consultation with the appellee, was a conditional assignment—conditioned upon the assignee’s “*assuming all duties and obligations*” of the assignor under its contract with the appellee.

Counsel for appellant are contending that the mere execution of this assignment by appellant and the acceptance of it by the Bureau of Federal Supply constituted a release of the appellant from its obligations to the appellee under the assigned contract even though the appellee itself not only never approved nor consented to the assignment but was never requested so to do. (Tr. 180).

We submit that the appellant’s contention that a *novation* occurred is entirely without merit. We are very willing to accept the rule which Counsel for appellant have quoted from 4 *American Jurisprudence*, Page 233:

“At the outset it should be noted that a party to a contract may not assign an obligation so as to avoid liability thereon and shift liability to the assignee; only rights under a contract can be assigned. It is otherwise, of course, *where the assignee assumes the obligation of the assignor with the consent of the other party to the contract and the latter releases the assignor from further liability*; in such case there is a novation.” (Emphasis supplied).

A clear statement of the novation rule is found in *Colley v. Chowchilla*, a California case reported in 255 Pac., 188, 192:

“An essential element of every novation is a new contract to which all the parties concerned agree**** It is essential, then, in order to constitute a novation by which the original debtor is released, the creditor being bound thereby to discharge the debt as to him and look to another for the payment of his demand, that a contract be made between the new debtor and the creditor by which the claim can be enforced against such new debtor; and if the new debtor enters into no contract with the creditor by which he becomes the debtor of the creditor, so that the creditor may maintain an action against him, there is not a novation.”

In this same case the court goes on to say:

“The most frequent novation is the substitution of a new debtor. To constitute this kind of a novation, there must be a mutual agreement among three parties,

the creditor, his immediate debtor, and the intended new debtor, by which the liability of the last named is accepted in the place of the original debtor in discharge of the original debt.*** The burden of proof rests upon him who asserts that there has been a novation to establish it."

Perhaps a still more concise statement of the novation rule is that found in 39 *American Jurisprudence*, at Pages 264 and 265:

"The effect of a novation by the substitution of a new debtor is to extinguish the liability of the original debtor. For obvious reasons the mere assumption of the debt by the new debtor cannot have this effect. It is not within the power of the original debtor to release himself from liability by contracting for the assumption of the debt by another. There can therefore be no doubt that in order to effect a novation by the substitution of a new debtor, the assent of the creditor to the substitution is essential. A contract should be made between the new debtor and the creditor by which the claim can be enforced against the former. The assent of the creditor, however, need not be established directly, but may be inferred from the circumstances surrounding the transaction and from the subsequent conduct of the parties. However, mere knowledge of and consent by the creditor to the assumption, in whole or in part, by another of his debtor's obligation to him will not, standing alone, create a novation so as to release the original debtor, without an additional agreement and consent on the part of the

creditor that the arrangement be given that effect. Thus, mere acceptance by a creditor of a certified check from his debtor does not constitute a novation, for there is no substitution of one debtor for another; the delivery of the check being simply a conditional payment, and the release of the original debtor being dependent on the condition that the check should be honored on presentation, he still remains the debtor, for he is bound for the debt as long as the check remains unpaid. Furthermore, consent is not to be implied merely from the performance of the contract by the substitute, for that might well consist with the continued liability of the original party, the substitute acting for that purpose in the capacity of agent for the original obligor. On the other hand, creditors cannot be forced to submit to a change of debtors."

A case which fully supports our contention that the appellee did not intend to release, and did not release the appellant from its obligation to the appellee is *City National Bank of Huron, South Dakota, et al. v. B. R. Fuller*, 52 Fed. (2d) 870, 79 A.L.R. 71, decided by the U. S. Circuit Court of Appeals, Eighth Circuit. In that case so many decisions of other courts upon the question of novation are assembled and discussed that it seems almost needless to cite any other authorities. The following are quotations from the court's opinion:

"The theory of novation is expressed by Professor Williston in his work on Contracts, vol. 1, p. 681, as follows: 'To work a novation it is not enough that a promise has been made to the original debtor to pay the debt; nor does the assent of the creditor help the matter unless an offer was made to him. The theory of novation is that the new debtor contracts with the old debtor that he will pay the debt, and also to the same effect with the creditor, while the latter agrees to accept the new debtor for the old. A novation is not made by showing that the substituted debtor agreed to pay the debt. It must appear that he agreed with the creditor to do so. Moreover, this agreement must be based on the consideration of the creditor's agreement to look to the new debtor instead of the old. The creditor's assent to hold the new debtor liable is therefore immaterial unless there is assent to give up the original debtor.' "

* * *

"In *Walker v. Wood et al.*, 170 Ill. 463, 48 N.E. 919, 920, the court said 'The assent or agreement may be either express or implied, but neither knowledge of the arrangement between the corporation and the firm, nor the partial payment of the debt, nor a demand for the payment, like the filing of the claim against the corporation, nor all combined, necessarily establish such assent or agreement as a legal conclusion.' "

* * *

"The cases establish the following propositions:

“(a) The mere assumption of a debt by a third party is not sufficient to constitute a novation.” (Citing cases).

“(b) There is no novation, unless there is an intent to relinquish the original claim and the original debtor.

“In *Leckie v. Bennett et al.*, 160 Mo. App. 145, 141 S.W. 706, the court said at page 710: ‘A creditor may, without releasing his original debtor, take advantage of the agreement of a third person to pay the debt, in consideration of a transfer of property to him by such original debtor. The original debtor in such case need not be discharged, and may still be held liable for the debt.

“(c) All parties must agree to the substitution of the new debt and debtor. The creditor is under no obligation to accept a new debtor. (Citing cases).

“(d) The intent of the creditor to look to the new debtor is not in itself a release of the old debtor, unless clear from all the circumstances that it was so intended, and the creditor may have a remedy against both old and new debtors. (Citing cases).

“On this subject we quote from 1 *Williston on Contracts*, sec. 393, p. 736: ‘Diversity of opinion likewise prevails in regard to the right of a creditor whose debtor has received a promise to pay the debt, to sue both the new promisor and the original debtor. Courts which hold that the original contract is in effect an offer of novation to the creditor naturally hold that if the creditor accepts the promisor as his debtor he releases the original debtor, and

on the other hand if he elects to sue the original debtor he thereby rejects the proffered novation and cannot afterwards sue the new promisor. The more common doctrine, however, allows the creditor a right against the original debtor and the new promisor.' ”

Another case which supports our position that the appellant's assignment of the stockpiling contract to the Bureau of Federal Supply did not release the appellant from its obligations to the appellee under said contract is *Walker v. Mills*, 78 Pac. (2d), 697 from which we quote the following language of the court which is found on page 699 of the opinion:

“It is stated as a general rule that ‘a party to a contract may not, unless authorized by the other party, either in the contract itself or otherwise, so assign the contract as to escape liability for the performance of the acts or duties imposed upon him by its terms,’ but the assignor remains liable to the other party for the proper performance by his assignee.”

In the case of *Southern Pac. Co. v. Butterfield et al*, 154 Pac., 932, it was held that where land was sold under contract providing that the agreement should bind the successors, heirs and assigns of the parties, an assignee of the purchasers, who was not a party to the contract was not liable to the

vendor for the unpaid balance of the purchase price; that the promise of the purchaser of the land to pay therefor could be enforced against the purchaser who signed the contract but could not be enforced against his assignee because the assignment had not brought together the seller and the purchaser's assignee and by reason thereof there had not been a meeting of the minds essential to the formation of a contract between the seller and the assignee of the original purchaser.

Another case to which we would call the Court's attention is *Harrison et al v. Fregger et al*, 294 Pac., 372, from which we quote as follows:

"The distinction between novation and assignment is clear; in novation the obligation between the original parties to the contract is completely extinguished, and a new obligation between the transferee and obligor is created and substituted for the previous one; while, after assignment, the obligation of the original debtor may continue to rest upon him, and he may be compelled to respond in the event of the default of the assignee. 46 C. J. 576; 5 C. J. 977.

"In order to effect a novation there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed;*** the point in every case, then,

is, did the parties intend by their arrangement to extinguish the old debt or obligation and rely entirely on the new, or did they intend to keep the old alive and merely accept the new as further security, and this question of intention must be decided from all of the circumstances. The existence of such an intention may, of course, be found although there is nothing positive in the agreement." 20 R. C. L. 366. See, also *McAllister v. McDonald*, above.

"Here we have merely an assignment, and there is nothing in the subsequent acts of the lessors in accepting rent from the assignee and thereafter permitting it to sublease the premises — it still being looked to for the rent — inconsistent with the intention on the part of the lessors to continue to look to Fregger for the rent in the event of the default of his assignee."

In the case of *Potts v. Burkett*, 278 S. W., 471, the court held that:

"The agreement between the parties that a contract may be assigned will not of itself release the party assigning it, unless from the circumstances an agreement, either express or implied, is to be inferred that such release was intended."

We have shown, and the record bears us out in this:

1. That the assignment from the appellant to the Bureau of Federal Supply was never expressly approved nor consented to by the appellee. (Tr. 180).

2. That the appellee never at any time expressly agreed with the appellant that the appellee would release the appellant from its obligations to the appellee under the assigned contract and would look entirely to the appellant's assignee for the fulfillment of those obligations.

3. That there was never any privity between the appellee and the appellant's assignee and never any agreement between them under which said assignee agreed to assume and to fulfill the appellant's obligation to reimburse the appellee for its cost of stockpiling the concentrates which had theretofore been or those which might thereafter be removed from storage for sale to other smelters.

Now let us see whether this showing can be overcome by implications arising from the appellee's conduct.

When appellant first advised appellee that appellant proposed to remove the stockpiled concentrates from storage and ship the same to other smelters, the appellee insisted upon being reimbursed for its stockpiling costs. (Tr. page 73; Exhibit No. 11 — a letter from appellee to appellant, dated March 11, 1948). Here we would call attention to the word "not" in the tenth line from the foot of page 73 of the Transcript. This word should be "now."

Again on May 10, 1948, Sullivan, in an-

other letter to the appellant again insisted upon reimbursement for its stockpiling costs (Exhibit No. 13; Tr. pages 77-78).

After the appellant had removed a considerable amount of concentrates from the stockpiles and shipped the same to other smelters, and immediately upon the appellee's being advised that appellant proposed to transfer the physical custody of the remaining concentrates to the Bureau of Federal Supply, the appellee by letter dated October 27, 1948, again insisted upon its being reimbursed for its stockpiling costs. (Exhibit 17, Tr. page 91).

Without the appellee's having receded from its position that it was entitled to reimbursement for its cost of stockpiling all concentrates which had been removed from storage by the appellant as well as for its cost of stockpiling all concentrates which should thereafter be removed from storage for sale to other parties, the appellant assigned to the Bureau of Federal Supply the contract under which said concentrates had been stockpiled. The assignment was dated November 30, 1948.

On February 3, 1949, and before any additional concentrates had been removed from

the stockpiles the Bureau of Federal Supply, presumably recognizing the fact that the appellee had not approved nor consented to said assignment, and certainly knowing that up to that time no contract had been entered into between the Bureau of Federal Supply and the appellee, drafted and submitted to the appellee a proposed contract which, if it had been executed by the appellee, would have replaced the old contract between the appellee and the appellant. But the appellee refused to execute, and never did execute this proposed contract (Exhibit No. 21) for the reason that, as interpreted by the Bureau of Federal Supply, it made no provision for appellee's reimbursement for *all* of its stockpiling expense, and for the reason that in subsequent correspondence the Bureau of Federal Supply declined to assume all obligations of the appellant under the original stockpiling agreement, as amended on July 12, 1944.

There is certainly nothing in all this which would give rise to any implication that the appellee agreed to release the appellant from its obligations under the old contract and to look to the Bureau of Federal Supply for appellee's reimbursement.

And the fact that thereafter the Bureau

of Federal Supply finally denied that there ever existed any obligation upon the appellant's part to reimburse the appellee for any of its stockpiling costs would certainly conclusively indicate that there was never any bona fide assumption of those costs by the Bureau of Federal Supply and that there was never any *novation*, as appellant now contends.

We respectfully submit that the judgment of the District Court should be affirmed.

CHAS. E. HORNING,

ROBERT E. BROWN,

Attorneys for Appellee.



No. 14756

United States
Court of Appeals
for the Ninth Circuit.

MARLIN FERRIS GOGGANS, Also Known as M.
F. GOGGANS,

Appellant,

vs.

RETA OSBORN,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED

AUG - 8 1955

PAUL P. O'BRIEN, CLERK



No. 14756

United States
Court of Appeals
for the Ninth Circuit.

MARLIN FERRIS GOGGANS, Also Known as M.
F. GOGGANS,

Appellant,

vs.

RETA OSBORN,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavit of Defendant on Motion of Plaintiff to Set Case for Trial	18
Affidavit of Defendant on Order to Show Cause, Filed April 6, 1953	35
Affidavit of Defendant on Order to Show Cause, Filed March 8, 1955	44
Affidavit in Support of Motion for Order to Show Cause	41
Answer	8
Answer to Cross-Complaint	17
Attorneys of Record	1
Certificate of Clerk to Record on Appeal	54
Complaint	3
Decree	33
Dissolution of Partnership	20
Findings of Fact and Conclusions of Law	30
Memorandum Opinion	45
Notice of Appeal	49
Objection to Order and Judgment	48
Order, Filed November 12, 1954	39

INDEX	PAGE
Order, Filed March 15, 1955	46
Order Extending Time to File Record and Docket Appeal	52
Order to Show Cause	43
Reply Affidavit of Plaintiff	38
Statement of Points	52
Statement of Points and Designation of Rec- ord for Printing	55
Stipulation, Filed August 10, 1951	6
Supersedeas Bond	50
Transcript of Opinion	38

ATTORNEYS OF RECORD

EDWARD V. DAVIS,

DAVIS, RENFREW AND HUGHES,

Box 477, Anchorage, Alaska,

Attorneys for Appellee.

GEORGE B. GRIGSBY,

Central Bldg., Anchorage, Alaska,

Attorney for Appellant.

IV.

That during the marriage of the parties hereto they have acquired certain real and personal property, including the home of the parties hereto situated at 1547 H Street, Anchorage, Alaska, a painting contracting business and retail and wholesale paint and wallpaper business known as the M. F. Goggans Co., which said businesses are owned solely by the parties hereto as co-partners, automobiles, trucks, equipment, furniture and fixtures used in connection with said businesses, and cash in banks.

V.

That there is an incompatibility of temperament existing between the plaintiff and defendant, in the following particulars, to wit: that the likes and dislikes of the parties are greatly divergent, so that there has been a great deal of arguing and bickering between the plaintiff and defendant about all manner of things; that the plaintiff and defendant have no common interests or desires; and that defendant has been critical and fault-finding toward plaintiff. That such incompatibility of temperament has existed for some time prior hereto, and as a result thereof plaintiff and defendant separated on a date prior hereto, and have not since lived or cohabited together as wife and husband. That, as plaintiff believes and so alleges the fact to be, it will never be possible for plaintiff and defendant to live together amicably as wife and husband, and there is no possibility of a reconciliation between them. That

plaintiff has at all times since said marriage endeavored to resolve the differences between the parties and is without fault in the matter.

VI.

That the property belonging to the parties hereto has been accumulated through their joint efforts from the date of their marriage to the 5th day of January, 1951, and that the plaintiff is entitled to an equitable division of said property. That the plaintiff is further entitled to the sum of \$100.00 per week for her living expenses from the business belonging to the parties hereto, which said sum has been agreed upon by the parties hereto.

Wherefore, plaintiff prays for judgment as follows:

1. That the bonds of matrimony heretofore and now existing between the plaintiff and defendant may be set aside and held for naught.

2. That plaintiff be awarded, as her sole and separate property, an equitable share of the property owned by the parties hereto, and that defendant be ordered to pay to plaintiff herein, from the funds of the businesses owned by the parties, the sum of \$100.00 per week as and for her support and maintenance during the pendency of this action.

3. That the plaintiff be restored to her maiden name, to wit: Reta Osborn.

4. For such other and further relief as may be meet and equitable in the premises.

DAVIS & RENFREW,
Attorneys for Plaintiff.

By /s/ EDWARD V. DAVIS.

Duly verified.

[Endorsed]: Filed August 7, 1951.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and agreed between Davis & Renfrew, attorneys for the plaintiff, and George B. Grigsby, attorney for the defendant, as follows:

Whereas, under date of August 7, 1951, the above-entitled Court entered an order to show cause and temporary restraining order in the above-captioned matter, which order to show cause was set to be heard on the 10th day of August, 1951, at the hour of 4 o'clock p.m. and

Whereas, the attorneys above named, representing the respective parties hereto, have agreed as to the matters requested for decision of the Court by virtue of said order to show cause.

Now Therefore, it is stipulated as follows:

1. That the plaintiff shall receive from the defendant out of the assets of the partnership business known as the M. F. Goggans Co. the sum of \$100.00 per week as a drawing until such time as a final settlement or adjudication of the above-cap-

tioned cause is had between the parties, said sum to be paid by check or cash to the plaintiff at the office of Davis & Renfrew or mailed to the plaintiff in care of said firm at Box 477, Anchorage, Alaska.

2. That the defendant M. F. Goggans shall be entitled to receive and draw out of the assets of the M. F. Goggans Co. the sum of \$150.00 per week pending the final settlement or adjudication of the above-captioned cause.

3. That the defendant shall be restrained and enjoined by order of Court from accosting, annoying or molesting the plaintiff in this action in any manner whatsoever, or from interfering with the plaintiff in her possession of the family home at 1547 H Street, Anchorage, Alaska, pending the final adjudication of the above-captioned cause by the parties.

4. That the defendant shall be restrained and enjoined, during the pendency of this action, from disposing of any of the assets of the M. F. Goggans Co. or from dissipating the cash or bank accounts of the said company other than such sales or expenditures of the cash assets of the said company normal or customary in the usual course of trade thereof.

5. That each of the parties hereto shall, during the pendency of this action, deliver each to the other any mail or personal property now in their possession or hereafter to come into their possession and that each of the parties hereto specifically agrees that they will refrain from writing checks on the

bank accounts of the M. F. Goggans Co. or otherwise disposing of the assets of the said company except as is hereinabove provided.

6. That an order of this Court shall be entered in accordance with the above and foregoing provisions.

/s/ RETA OSBORN GOGGANS.

DAVIS & RENFREW,

By /s/ JOHN C. HUGHES,

/s/ M. F. GOGGANS,

Attorneys for Plaintiff.

GEORGE B. GRIGSBY,

By /s/ GEORGE B. GRIGSBY,

Attorney for Defendant.

[Endorsed]: Filed August 10, 1951.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and answering the complaint of plaintiff filed herein, admits, denies and alleges as follows:

I.

Admits the allegations set forth in paragraphs I, II, and III of plaintiff's complaint and the whole thereof.

II.

Answering paragraph IV of said complaint de-

fendant admits the allegations thereof except as hereinafter specifically denied, and in that behalf defendant alleges that at the time of the marriage of plaintiff and defendant the defendant was the owner of a painting and contracting business and wholesale paint and wallpaper business, and had owned and operated the same for several years prior to said marriage, and from which defendant had earned a substantial annual income; that on January 1st, 1947, which was four days after said marriage was consummated, said business had tangible physical assets, consisting of a bank balance of \$8018.14, merchandise on hand of the value of \$14,086.40, and equipment of the value of \$14,321.21, in all aggregating the amount of \$36,425.95; that on said date said business was a going concern, had profitable contracts in force, had no liabilities, and the good will thereof was worth many thousands of dollars; that from and after Jan. 1st, 1947, defendant became a partner with plaintiff in said business and in May and June, 1947, the plaintiff invested in said business the sum of \$7500.00; that the plaintiff, since plaintiff and defendant became partners as aforesaid, has drawn from said business the sum of \$7738.48 which sum has been applied by plaintiff to her own personal use and not otherwise, and none of which has been applied to any purposes connected with said business, nor to any purpose connected with the household or other family expenses of plaintiff and defendant, but is exclusive of all sums drawn from said business by plaintiff for household, family and living expenses. That defend-

ant believes that a large part of said withdrawals aggregating \$7738.48 has been applied to the purchase and maintenance of property purchased by plaintiff in her own name and in which this defendant has no interest.

That on Jan. 1st, 1948, plaintiff and defendant established and opened a retail paint and wallpaper store in Anchorage, Alaska, which became a part of the business of the said partnership, and to which the plaintiff contributed her services in the management and operation thereof from said date until January 1st, 1951, on which date for reasons best known to plaintiff and not known to defendant, the plaintiff ceased to take any part in the management of said retail business, declared that she was through with the same, and since said time plaintiff has rendered no services to said partnership but has abandoned all connection therewith.

III.

Answering paragraph V of said complaint defendant admits that an incompatibility of temperament exists and has for a long time existed between plaintiff and defendant which has resulted in a situation such that the parties cannot longer live together amicably as husband and wife; that they have not cohabited together as husband and wife for a long time, and that a reconciliation is impossible, but defendant denies that said incompatibility is the result of any fault of defendant, denies that he has been critical and fault-finding toward plaintiff, and alleges on the contrary that such incompatibility is

the result of a loss of affection for defendant by plaintiff; that for the past two years or more the plaintiff has been cold and distant toward defendant, and in that behalf defendant alleges that he has at all times endeavored to maintain the amicable and affectionate relations which plaintiff and defendant enjoyed during the early part of their married life, that he has indulged plaintiff in her every whim, and has sought by every means in his power to prevent the estrangement which has taken place between the parties hereto, but plaintiff has repelled all his efforts and advances in that regard. Defendant denies that plaintiff "has at all times since said marriage endeavored to resolve the differences between the parties and is without fault in the matter" as alleged in her complaint, and in that behalf alleges that he is without fault in the premises, and that the plaintiff's attitude and conduct toward defendant as above stated is the result of unreal and fancied grievances which have no foundation in fact.

IV.

Answering paragraph VI of plaintiff's complaint defendant denies that the property belonging to the parties hereto has been accumulated through their joint efforts, except as stated in paragraph II of this answer; denies that plaintiff is entitled to the sum of \$100.00 per week for her living expenses from the business belonging to the parties hereto, and denies that said sum has been agreed upon by the parties hereto and in that behalf defendant alleges that for a long time prior to Jan. 1st, 1951,

defendant had permitted plaintiff to draw from the partnership funds the sum of One Hundred Dollars per week for household expenses; that after plaintiff abandoned said partnership on Jan. 1st, 1951, plaintiff continued to receive one hundred dollars per week from said funds for her own living and personal expenses, but without any arrangement or agreement with regard thereto, and that she is still on the date hereof receiving said allowance.

And for a Further and Affirmative Defense and Cross-Complaint Defendant Alleges as Follows:

I.

That defendant is now and for more than two years immediately prior to the commencement of this action has been, a bona fide resident of the Territory of Alaska.

II.

That plaintiff and defendant were married on the 28th day of December, 1928, and ever since have been and now are wife and husband.

III.

That no children have been born the issue of said marriage.

IV.

That during the married life of plaintiff and defendant they have acquired property interests, including a residence at 1547 H Street, Anchorage, Alaska, and since January 1st, 1947, the plaintiff

has been a partner in business with the defendant and continued as such partner up to Jan. 1st, 1951. That during the married life of the parties hereto the plaintiff contributed to some extent by the investment of monies and rendition of services to the acquisition of a part of the properties of plaintiff and defendant, and their operation and maintenance, as is more fully set forth in paragraph II of defendant's answer to plaintiff's complaint, which is herein by reference made a part of this paragraph. That since Jan. 1st, 1951, the plaintiff has contributed nothing, by services or otherwise, to the operation and maintenance of the business properties of the parties, but has on the contrary, purposely and maliciously interfered with the proper conduct of the said business affairs, by the withdrawal of business mail and withholding and secretion of the same, and otherwise, to the great detriment and damage of said business.

V.

That an incompatibility of temperament exists between plaintiff and defendant, and has for a long time existed, of such a nature and to such an extent, as to render it impossible for them to continue the marriage relation with any reasonable degree of happiness. That said incompatibility is largely the result of a loss of affection by plaintiff for defendant, and of unreal, fancied and imaginary grievances which plaintiff has permitted herself to harbor and entertain toward defendant, and which have no foundation in fact. That the defendant is without

substantial fault in the premises and on the contrary has striven by every means in his power to prevent the estrangement which has taken place between the parties, has indulged and humored the plaintiff in all respects, has at all times sought a reconciliation and resumption of amicable and affectionate family relations, but his efforts in that regard have been constantly repelled by plaintiff.

And for a Second Cause of Action on His Cross-Complaint, Defendant Alleges as Follows:

I.

Defendant realleges, reaffirms and adopts as a part of this cause of action, all the allegations set forth in paragraphs I, II and III of the First Cause of Action on this cross-complaint.

II.

Defendant realleges, reaffirms and adopts as a part of this cause of action, all the affirmative allegations set forth in his answer to plaintiff's complaint.

II.

That during the last two years or more of the married life of plaintiff and defendant, the plaintiff has inflicted upon defendant a course of cruel and inhuman treatment calculated to impair his health and at the same time constituting personal indignities rendering his life burdensome, as follows:

That plaintiff has made numerous and frequent

false charges of infidelity on the part of defendant, without the slightest foundation in fact.

That plaintiff has made numerous, frequent and false charges of violence and threats of violence on the part of defendant.

That defendant has been falsely accused by plaintiff on numerous occasions of squandering the assets of the business partnership formerly operated and conducted by plaintiff and defendant.

That plaintiff by false charges has caused defendant to be enjoined in this court from occupying the home of plaintiff and defendant.

That plaintiff has made false charges of drunkenness against defendant.

That plaintiff and defendant have been business partners, as hereinbefore in this answer stated, from Jan. 1st, 1947, to Jan. 1st, 1951.

That on said last-mentioned date plaintiff has ceased to participate in said business or the conduct thereof in any respect whatever, except that plaintiff has withdrawn from the post office mail addressed to said business partnership, has withheld and secreted the same for several weeks, that said mail included several checks payable to said partnership in payment of bills due said partnership, and said withholding of said mail has caused numerous persons to be rebilled on said accounts to their annoyance and dissatisfaction, and to the great annoyance and inconvenience of defendant.

That the acts of cruelty and personal indignities above set forth have caused defendant—has caused defendant constant worry, distress and humiliation

and has to a considerable extent impaired his health, and has caused him to seek medical advice and treatment.

III.

That as heretofore in this answer stated and admitted, during the married life of plaintiff and defendant the parties have acquired a residence and established a retail store, and the plaintiff has to some extent, by her services as a housewife during a considerable part of the married life of plaintiff and defendant, and by her services in the management of said retail store, contributed to the maintenance, operation and increase of the business assets of plaintiff and defendant. That on the other hand, the plaintiff has by her conduct toward plaintiff as hereinbefore alleged has hindered and obstructed the maintenance and expansion of said business. That the defendant concedes and desires that an equitable and just adjustment of the financial status of the parties should be made in any decree that may be rendered herein.

IV.

That the plaintiff is and has been for some months in the employ of her attorneys in this suit, and is earning and will continue to earn in the future a salary of at least \$400.00 per month, and probably in excess of said sum, has considerable means and property of her own, all of which should be taken into consideration in an equitable adjustment of the business affairs and properties of plaintiff and defendant.

Wherefore defendant prays for judgment that he be awarded a decree of divorce from plaintiff; that said decree should provide for an equitable and final adjustment of the business affairs and properties of plaintiff and defendant, including such equitable division of properties owned by plaintiff and defendant as may be made without disrupting and damaging the business heretofore conducted by plaintiff and defendant up to Jan. 1st, 1951, and thereafter by the defendant, and for such other and further relief as to the court may seem equitable in the premises.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed September 27, 1951.

[Title of District Court and Cause.)

ANSWER TO CROSS-COMPLAINT

Comes now the plaintiff above named and answering the cross-complaint of defendant on file herein, admits, denies and alleges as follows:

I.

Plaintiff denies generally and specifically each and every allegation contained in defendant's cross-complaint contrary to the facts as alleged in plaintiff's complaint on file herein.

Wherefore, having fully answered defendant's

cross-complaint, plaintiff prays that defendant take nothing by said cross-complaint and that plaintiff have judgment as prayed for in her complaint on file herein.

DAVIS & RENFREW,
Attorneys for Plaintiff;

By /s/ EDWARD V. DAVIS.

Duly verified.

[Endorsed]: Filed October 2, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF DEFENDANT ON MOTION
OF PLAINTIFF TO SET CASE FOR
TRIAL

United States of America,
Territory of Alaska—ss.

M. F. Goggans being first duly sworn on oath deposes and says: that he has read the affidavit of the plaintiff, dated October 2nd, 1951, and filed in support of her motion to set the above-entitled cause for trial at the earliest possible date.

That said affidavit is absolutely untrue in the following particulars.

That said plaintiff has not been denied access to the records and files of the business of M. F. Goggans Co., either prior to or since the commencement of this action.

That it is untrue that since the inception of this

action plaintiff has had only fragmentary reports as to the financial status of the business above mentioned. That the plaintiff or her attorney has been furnished with copies of the financial statements of said business complete for the years 1947, 1948, 1949 and 1950, and her attorney has spent hours in the office of said defendant with the accountant and bookkeeper of defendant, and has had free and complete access to every record and account pertaining to said business, and her said attorney has been assisted in every way possible in obtaining all information possibly available as to the financial status of said business for said years and for the year 1951 to the date of said inspection by said attorney for plaintiff. That defendant has at all times been solicitous that plaintiff and her attorney be afforded the fullest opportunity to examine the books and records of said business because of the numerous and frequent assertions by plaintiff that the defendant has been in the past and continues to dissipate the funds of said business, and because defendant desires to put an end to said false accusations.

That the statement in said affidavit that defendant "has, in violation of the stipulation on file herein, expended funds belonging to the businesses above mentioned for his own personal use, all to the detriment of plaintiff," is untrue and without any foundation in fact.

That the statement of plaintiff in said affidavit that the defendant has since the service on him of the restraining order herein and up to and including

the 28th day of August, 1951, dissipated funds of the said business to the amount of \$747.78 or more is likewise untrue and without any foundation in fact. That the defendant has not expended any sum whatsoever in violation of the court's restraining order nor except for legitimate business purposes.

That defendant is perfectly willing that the trial of this case be set at the earliest possible date, consistent with reasonable notice to defendant and his attorney.

/s/ M. F. GOGGANS.

Subscribed and sworn to before me this 9th day of October, 1951.

[Seal] /s/ GEORGE B. GRIGSBY,
Notary Public for Alaska.

My Commission expires May 20, 1955.

[Endorsed]: Filed August 9, 1951.

DISSOLUTION OF PARTNERSHIP

This Agreement, made and entered into this 2nd day of November, 1951, by and between Marlin Ferris Goggans, sometimes known as M. F. Goggans, and as Mike Goggans, of Anchorage, Third Judicial Division, Territory of Alaska, the party of the first part, and Reta Osborn Goggans, sometimes known as Reta O. Goggans and as Reta Osborn, of Anchorage, Third Judicial Division, Territory of Alaska, the party of the second part, Witnesseth:

Whereas, the parties to this agreement, since the 1st day of January, 1947, have been associated as

co-partners in a certain business conducted at Anchorage, Alaska, and known as the M. F. Goggans Co., and

Whereas, such business for the year 1947 consisted of a certain painting contracting business and since 1947 has consisted of a painting contracting business and a wholesale and retail paint business, and

Whereas, the parties to this agreement, in addition to being partners, have been and now are husband and wife, respectively, and

Whereas, the second party, on or about the 7th day of August, 1951, commenced an action in the District Court for the Territory of Alaska, Third Division, which sought to dissolve the marriage relationship between the parties and to determine the property rights of the parties, and

Whereas, the parties have mutually agreed upon a settlement of their property rights and upon a dissolution of the partnership, by the terms of which the second party is to transfer to the first party all the right, title and interest of the second party in and to the partnership business and the property belonging thereto, and whereby the first party is to make certain payments to the second party, all as hereinafter more fully set forth.

Now Therefore, in consideration of the premises and in consideration of the respective promises of the parties and of the property to be transferred by the second party and of the money to be paid by the first party, the parties hereto do hereby covenant and agree as follows:

The second party concurrently with the execution

of this agreement has executed and delivered to first party a Bill of Sale conveying to the first party all the right, title and interest of the second party in and to the business known as F. M. Goggans Co. and all the property belonging thereto, including furniture, fixtures, equipment, merchandise inventory, supplies, cash on hand and on deposit. The second party has retained to herself household furnishings and fixtures, a 1947 Pontiac automobile bearing 1951 Alaska license 5919, and the family home heretofore carried on the books of the partnership as a portion of the partnership assets.

The parties agree that the partnership relationship heretofore existing between them and above described and known as M. F. Goggans Co. shall be dissolved as of the close of business of Nov. 1st, 1951, and in that connection second party waives any claim she would otherwise have to profits from the operation of the partnership business for the year 1951 as well as for prior years except as to payments to be made to the second party by the first party as hereinafter more fully set out.

First party agrees that he will assume and pay all debts, bills, obligations and liabilities of the partnership above described and of all business enterprises heretofore operated by the parties from the inception of the partnership forward, and that he will save and hold the second party harmless as against any loss or liability in connection with such bills, obligations, debts or liabilities without exception.

First party agrees that he will assume and pay any and all debts, liabilities or obligations that there

may be by reason of taxes, municipal, Territorial or Federal, arising out of income earned or alleged to have been earned by the parties to this agreement in connection with the partnership business above described and from the business operated by them including personal liability for taxes of both partners by reason of money earned or alleged to be earned by the operation of the partnership business as above set forth up to and until the 1st day of January, 1951, and the first party expressly agrees that if any additional assessment of taxes is made by any governmental authority by reason of the operation of the partnership or the conduct of its business up to and until said date, that he will assume and pay such taxes and save the second party harmless therefrom.

It is agreed by the parties that the family home located at 1547 H Street, Anchorage, Alaska, and more particularly described as Lot 10, Block 42-B, South Addition, is presently encumbered by two mortgages, namely, a first mortgage in favor of the First National Bank of Anchorage, Alaska, in an amount of approximately \$1500.00, and a second mortgage of \$13,000.00 in favor of W. P. Fuller & Co., and that the Pontiac automobile above mentioned is likewise encumbered, along with other personal property of the business, by a chattel mortgage in favor of W. P. Fuller & Co.

The first party agrees that concurrently with the execution of this agreement he will execute and deliver to the second party a deed conveying to the second party all the right, title and interest of the first party in and to the real estate known as 1547

H Street hereinabove described, together with the furniture and fixtures therein contained, subject to the mortgage in favor of W. P. Fuller & Co. above described.

It is agreed by the parties that W. P. Fuller & Co. has agreed in writing to a partial release of the chattel mortgage now held by it insofar as such mortgage encumbers the 1947 Pontiac sedan automobile above described upon execution and delivery to W. P. Fuller & Co. of a chattel mortgage covering a certain 1951 Chevrolet automobile now owned by the first party. The first party agrees that concurrently with the execution of this agreement he will execute and deliver to W. P. Fuller & Co. a chattel mortgage covering the 1951 Chevrolet automobile above mentioned in order that the 1947 Pontiac sedan automobile may be released from the presently-existing chattel mortgage. The first party further agrees that concurrently with the execution of this agreement he will pay to the First National Bank of Anchorage, the balance of the first mortgage and that he will cause satisfaction of such mortgage to be recorded in the records of the Anchorage Recording Precinct, in order that the mortgage to W. P. Fuller & Co. will stand as a first and prior mortgage against the real property.

It is agreed by the parties that the first party has acquired an interest in certain real and personal property at Bruin Bay on the west shore of Cook Inlet in the Third Division. The second party acknowledges that she neither has nor claims any interest in such property and concurrently with the

execution of this agreement the second party agrees that she will execute and deliver to first party a quit-claim deed conveying to the first party all the right, title and interest which the second party might have or claim in and to such property.

It is agreed by the parties that the second party has acquired certain personal property located near Lake Spenard in the Anchorage Precinct, Third Division. The first party acknowledges that he neither has nor claims any interest in such property and concurrently with the execution of this agreement, the first party agrees that he will execute and deliver to the second party a bill of sale conveying to the second party all the right, title and interest which the first party might have or claim in and to such property.

The first party agrees that on or before the 10th day of November, 1951, first party will pay to the second party the sum of five hundred dollars (\$500.00), and that a like sum of five hundred dollars (\$500.00) will be paid by the first party to the second party on or before the 10th day of each month thereafter until such payments have been made for a period of four years and four months, or until February, 1956. From the sum of \$500.00 per month above mentioned, the second party agrees that she will pay the sum of \$250.00 per month commencing with the 15th day of November, 1951, toward the satisfaction of the W. P. Fuller & Co. mortgage against the family home hereinabove described. Provided that, at his option, the first party may pay to second party the sum of \$250.00 monthly

as aforesaid, and deliver to said second party monthly as aforesaid, the first party's certified check for the sum of \$250.00 payable to the order of W. P. Fuller & Co.

The first party agrees that as soon as the same may be done after the execution of this agreement that he will secure from W. P. Fuller & Co. a release of any claim of such company against the second party arising by reason of the partnership relation of the parties hereto and by reason of any purchases made by the partnership business from W. P. Fuller & Co., without exception, other than the \$13,000.00 mortgage which is to be paid as hereinabove set forth.

The first party agrees to assume and pay the bill of W. O. Holt & Son for excavation and installation of city water to the family home above mentioned, such bill amounting to the sum of \$272.50, together with a mortgage given by the second party to the City of Anchorage as assessment for city water amounting to \$161.91, the latter bill being payable in three installments, the first installment being due approximately December 1, 1951. It is agreed that the bill of W. O. Holt & Son above mentioned is past due and first party agrees to pay the same concurrently with the execution of this agreement. The first party, at his option, shall be entitled to discharge the two obligations herein mentioned by paying the amounts thereof to the second party, in which event the second party shall pay such obligations and save and hold the first party harmless therefrom.

It is agreed that the second party desires to make certain improvements to the property known as 1547 H Street above described and that approximately \$1,500.00 in wholesale cost of glass, paint, wallpaper and other materials will be required in making such improvements. The first party agrees that on or before May 1, 1952, he will pay to the second party the sum of \$1,500.00 or that he will furnish to the second party an equivalent amount at wholesale cost in glass, paint, wallpaper or other materials for the purpose of making such improvements.

It is specifically agreed that the first party shall have the right to make the payments provided by this agreement at a sooner time than is hereinabove set out if he is able to do so.

It is agreed by the parties that the second party has incurred attorneys' fees in the amount of \$750.00 in connection with the Court action above mentioned and that in addition to the attorneys' fees the second party has incurred certain Court costs and expenses amounting to the sum of \$182.65 including the cost of taking deposition and the parties hereto agree that such attorneys' fees and costs are to be borne equally by the parties and concurrently with the execution of this agreement the first party agrees to pay to the second party the sum of \$466.32, being his one-half share of such costs and attorneys' fees.

The first party is to pay his costs and attorney's fees in connection with such action from his own funds, without liability therefor against the second party.

Except as herein provided, each of the parties to

this agreement hereby releases the other party from any claim or obligation against such other party arising out of the business heretofore conducted by the parties or out of the marriage relationship heretofore and now existing between the parties.

It is agreed by the parties hereto that a duplicate original of this dissolution agreement may be filed in the case of Goggans vs. Goggans, No. A-7094 in the District Court for the Territory of Alaska, Third Division, and that such dissolution agreement may be considered by the Court in such action as a property settlement between the parties and at the discretion of the Court may be made a part of the final decree of divorce by reference.

This agreement is to inure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof, the parties to this agreement have hereunto set their hands at Anchorage, Alaska, the day and year in this agreement first written.

/s/ M. F. GOGGANS,
First Party;

/s/ RETA OSBORN GOGGANS,
Second Party.

Executed in the presence of:

/s/ EDWARD V. DAVIS,
/s/ GEORGE B. GRIGSBY.

Approved:

/s/ GEORGE B. GRIGSBY,
Attorney for First Party.

Approved:

DAVIS & RENFREW,
By /s/ EDWARD V. DAVIS,
Attorneys for Second Party.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 30th day of November, 1951, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Marlin Ferris Goggans, sometimes known as M. F. Goggans and as Mike Goggans, and Reta Osborn Goggans, sometimes known as Reta O. Goggans and as Reta Osborn, known to me and to me known to be the individuals named in and who executed the foregoing instrument and they, each for himself and herself acknowledged to me that they signed and sealed the same as their voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first hereinabove written.

[Seal] /s/ GEORGE B. GRIGSBY,
Notary Public for Alaska.

My commission expires May 20, 1955.

[Endorsed]: Filed November 30, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing at Anchorage, Third Judicial Division, Territory of Alaska, on the 29th, 30th and 31st days of October, 1951, and the 1st day of November, 1951, before the Honorable Anthony J. Dimond, District Judge, sitting as a court of equity, and without the aid of a jury. The plaintiff, Reta Osborn Goggans, was personally present in Court, together with Edward V. Davis, one of her attorneys. The defendant, Marlin Ferris Goggans, was likewise personally present in Court together with George B. Grigsby, his attorney.

Thereupon the parties having agreed upon a property settlement satisfactory to both parties and the Court being fully advised in the premises, now finds the facts in this matter to be as follows:

Findings of Fact

I.

That plaintiff and defendant are now, and for more than two years immediately preceding the commencement of this action have been, bona fide residents and inhabitants of the Territory of Alaska, and now reside at Anchorage, Alaska.

II.

That plaintiff and defendant intermarried at Fairbanks, Territory of Alaska, on the 28th day of December, 1946, and ever since have been, and now are, wife and husband, respectively.

III.

That no children have been born the issue of said marriage.

IV.

That the property rights of the parties hereto have been settled by agreement of the parties and that there has been filed in this action a duplicate original of the Partnership Dissolution of the M. F. Goggans Co., which sets forth the agreement of the parties as to their property rights.

V.

That there is an incompatibility of temperament existing between the plaintiff and defendant, in the following particulars, to wit: That the likes and dislikes of the parties are greatly divergent, so that there has been a great deal of arguing and bickering between the plaintiff and defendant about all manner of things; that the plaintiff and defendant have no common interests or desires. That such incompatibility of temperament has existed for some time prior hereto, and as a result thereof plaintiff and defendant separated on or about the 7th day of August, 1951, and have not since lived or cohabited together as wife and husband. That it will never be possible for the plaintiff and defendant to live together amicably as wife and husband and there is no possibility of a reconciliation between them.

VI.

That the plaintiff is entitled to be restored to her maiden name, to wit: Reta Osborn.

And from the foregoing findings of fact, the Court concludes the law in this matter to be as follows:

Conclusions of Law

I.

That the defendant is entitled to a decree of this Court dissolving absolutely the bonds of matrimony heretofore and now existing between plaintiff and defendant.

II.

That the plaintiff is entitled to be restored to her maiden name, to wit: Reta Osborn.

III.

That the property settlement agreement reached by the parties as embodied in the partnership dissolution agreement filed with this Court should be and is hereby approved by the Court and adopted by the Court as a property settlement between the parties to this action and that such settlement agreement as contained in such dissolution of partnership should be by reference made a part of the decree to be entered in this matter, and that both of the parties to this action should be bound by all of the provisions of such agreement to the same extent as though the same were set out in full in such decree.

Let Judgment and Decree be entered accordingly.

Done in Open Court at Anchorage, Third Judicial

Division, Territory of Alaska, this 30th day of November, 1951.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 30, 1951.

In the District Court for the Territory of Alaska,
Third Division

No. A-7094

RETA OSBORN GOGGANS,

Plaintiff,

vs.

MARLIN FERRIS GOGGANS, Also Known as M.
F. GOGGANS,

Defendant.

DECREE

This matter came on regularly for hearing in open Court at Anchorage, Third Judicial Division, Territory of Alaska, on the 29th, 30th and 31st days of October, 1951, and on the 1st day of November, 1951, before the Honorable Anthony J. Dimond, District Judge, sitting as a Court of equity, and without the aid of a jury. The plaintiff Reta Osborn Goggans being personally present in Court, and represented by Edward V. Davis, one of her attorneys, and the defendant Marlin Ferris Goggans was like-

wise personally present in Court together with George B. Grigsby, his attorney.

Thereupon the parties having agreed upon a property settlement satisfactory to both parties and the Court being fully advised in the premises, and Findings of Fact and Conclusions of Law in this matter having been duly filed and entered by the Court;

It Is Hereby Ordered, Adjudged and Decreed that the bonds of matrimony heretofore and now existing between the plaintiff and the defendant are herewith dissolved and made of no further legal effect.

It is Further Ordered, Adjudged and Decreed, and this Court does hereby further order, adjudge and decree that the plaintiff be, and she is hereby, restored to her maiden name, to wit: Reta Osborn.

It is Further Ordered, Adjudged and Decreed that the property settlement agreement reached by the parties to this action as contained in the partnership dissolution executed by the parties and of which a duplicate original has been filed with this Court in this action, is hereby approved and adopted by the Court as a property settlement between the parties and such property settlement agreement as contained in the dissolution of partnership above named by reference is made a part of this decree to the same extent as though set out in full herein and each of the parties to this action are to be considered as being bound by all the terms contained in the dissolution of partnership above mentioned to the same extent as though the agreements contained therein were expressly set forth as a part of this decree.

Done in Open Court at Anchorage, Third Judicial

Division, Territory of Alaska, this 30th day of November, 1951.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered November 30, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF DEFENDANT ON
ORDER TO SHOW CAUSE

United States of America,
Territory of Alaska—ss.

Marlin Ferris Goggans, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the affidavit of the plaintiff, Reta Osborn, filed on this motion. That on the 30th day of November, 1951, affiant was granted a divorce from the plaintiff in this action and that the Dissolution of Partnership Agreement referred to in plaintiff's said affidavit was in said Decree approved and adopted as a part thereof.

That affiant has complied with all the terms of said Dissolution of Partnership Agreement except that since August, 1952, affiant has been unable to make the monthly payments of \$500.00 per month as required by said agreement for the reason that since said month of August, 1952, affiant has had no interest in any of the assets of the M. F. Goggans Com-

pany whatever, has had no income therefrom and has been absolutely without available funds for the payment of said monthly installments of \$500.00. That by the terms of a certain contract theretofore entered into between affiant and W. P. Fuller & Company, affiant was in the month of August, 1952, compelled to surrender all his interest in the assets of the M. F. Goggan Company and the possession thereof to the W. P. Fuller & Company, and ever since said date the said W. P. Fuller & Company have had entire control and possession of said assets and all interests pertaining thereto. That affiant has no knowledge or information as to whether or not the holder of the mortgage on the real property set aside to the plaintiff by said Dissolution of Partnership Agreement has threatened foreclosure proceedings or not.

That affiant is absolutely without funds or financial resources at the present time and has no personal or real property from which to obtain funds and has not, since the month of August, 1952, had any assets, real or personal, from which funds could be derived sufficient in amount to make any substantial payment upon the said monthly obligation to plaintiff of \$500.00. That affiant has not to exceed \$50.00 in cash at the present time. He is not earning any money and has not earned any money since August, 1952.

/s/ M. F. GOGGANS.

Subscribed and sworn to before me this 4th day of April, 1953.

[Seal] /s/ GEORGE B. GRIGSBY,
Notary Public for Alaska.

My commission expires May 20, 1955.

[Endorsed]: Filed April 6, 1953.

[Title of District Court and Cause.]

REPLY AFFIDAVIT OF PLAINTIFF

United States of America,
Territory of Alaska—ss.

Reta Osborn, being first duly sworn, upon her oath, deposes and says:

That she is the plaintiff in the above-entitled action; that your affiant has read the affidavit of defendant on order to show cause; that your affiant is informed and believes that the defendant has made at least two trips to the continental United States since he has ceased making payments to your affiant; that the defendant now resides in a large dwelling located at 445 East Fifth Avenue, Anchorage, Alaska, which dwelling your affiant is informed would require substantial rentals, but the circumstances of rental or hire of said dwelling are unknown to your affiant; that the defendant has access to and uses, through ownership or through some means not known to your affiant, a 1952 Buick automobile.

That the defendant has at least once since ordered by the Court to make payments to your affiant, mar-

ried and taken on additional obligations of support and accordingly your affiant is lead to believe that the defendant has assets from some source which he has failed and refused to apply toward the obligation due and owing to your affiant by order of the Court hereinabove referred to.

/s/ RETA OSBORN.

Subscribed and sworn to before me this 7th day of April, 1953.

[Seal] /s/ JOHN C. HUGHES,
Notary Public for Alaska.

My commission expires April 9, 1955.

[Endorsed]: Filed April 7, 1953.

[Title of District Court and Cause.]

TRANSCRIPT OF OPINION

On Friday, November 5, 1954, in open court at Anchorage, Alaska, the Honorable J. L. McCarrey, Jr., U. S. District Judge, rendered the following opinion:

The Court: In the case of Goggins vs. Goggins, the case was heard early this week, it comes before the Court upon an Order to Show Cause why the Defendant, Marlin Ferris Goggins, should not be held in contempt of court because of his failure to comply with the decree. Now, counsel for the Defendant argued that this was not a proper proceed-

ing and admitted that he should have raised this question at an earlier date. Since it does not concern itself with alimony, but concerns itself only with the decree wherein is set forth the terms and conditions of the property settlement, I agree with counsel for the Defendant that this is not a proper proceedings and that contempt will not lie at this time. However, I feel that the Defendant has not proved that he is at this time not in position to meet the requests of the property settlement reduced and qualified as stated by Mr. Davis for the Plaintiff and is at this time hereby ordered to pay the sum of \$1500.00, plus interest upon the mortgage in conformance with the letter directing that payment by the mortgaged company which is contained in the Affidavit in the case, and, counsel for the Plaintiff may prepare an Order in conformance with the ruling of the Court.

Duly verified.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

ORDER

This matter having come on regularly for hearing on the 3rd day of November, 1954, on motion of the plaintiff and upon order of the Court heretofore made requiring the defendant to show cause on such date as to why he should not be dealt with for con-

tempt of Court, and the Court having heard argument of respective counsel and having considered the matter raised by counsel for the defendant that contempt proceedings will not lie in this matter and the Court being fully advised in the premises,

Now Therefore, It Is Hereby Ordered and Adjudged as follows:

1. That the defendant Marlin Ferris Goggans is not subject to contempt proceedings at this time.

2. That Marlin Ferris Goggans is hereby ordered to pay forthwith to the plaintiff Reta Osborn, formerly Reta O. Goggans, the sum of \$1500.00 plus interest on \$9000.00 from January 1, 1954, at the rate of 6% per annum, as provided by the terms and conditions of a certain mortgage and in conformance with a letter from W. P. Fuller & Co., the mortgagee, directing such payment.

3. It is further ordered that the defendant Marlin Ferris Goggans shall pay to the plaintiff, on or before the 1st day of each month commencing with the 1st day of January, 1955, interest accrued on the mortgage above described to such time.

Done in Open Court at Anchorage, Third Judicial Division, Territory of Alaska, this 12th day of November, 1954.

/s/ JOHN L. McCARRY, JR.,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered November 12, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION
FOR ORDER TO SHOW CAUSE

United States of America,
Territory of Alaska—ss.

Reta Osborn, being first duly sworn, upon her oath, deposes and says:

That she is the plaintiff in the above-entitled action; that as will appear from the records and files of this action, this Court by its decree on the 30th day of November, 1951, approved and adopted as a part thereof, a settlement agreement between the parties and including the agreement of the defendant to pay certain monies to the plaintiff as therein more fully appears.

That under date of September 26, 1953, this Court ordered the defendant to make a payment of \$1,500.00 to the plaintiff to apply on the monies due by the decree above mentioned and that such sum was paid; that nothing has been paid on account of the monies due by such decree since such time.

That this Court on the 12th day of November, 1954, supplemented its previous orders in this matter and required the defendant to pay forthwith to the plaintiff the sum of \$1,500.00 plus interest at the rate of 6% per annum on \$9,000.00 from the 1st day of January, 1954, and such order further required the defendant to pay, monthly, accrued interest, all as will more fully appear from such order.

That the defendant has failed and refused to pay such money or any part thereof.

That as will more fully appear from the records and files of this action, part of the money to be paid by the defendant in this matter is represented by a mortgage upon the family home, which home was conveyed to the plaintiff and which mortgage was to be paid by the defendant. That plaintiff has received numerous letters threatening to foreclose such mortgage unless payment is made and the last of such letters fixed a deadline of February 1, 1955, for such payment and affiant is expecting mortgage foreclosure proceedings to be instituted shortly.

That the defendant is regularly employed at a salary by his own figures, in excess of \$6,000.00 per year. That as affiant is informed and believes and so alleges the fact to be defendant is well able to make the payments ordered by the Court and has refused to make such payments and has frankly stated that he does not intend to make such payments, and that as affiant believes defendant is in contempt of this Court.

This affidavit is made in support of affiant's motion for an order for the defendant to show cause as to why he should not be dealt with for his contempt of this Court.

/s/ RETA OSBORN.

Subscribed and sworn to before me this 23rd day of February, 1955.

[Seal] /s/ MILDRED M. HANSEN,
Notary Public for Alaska.

My commission expires: 12/19/58.

[Endorsed]: Filed February 23, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the motion of the plaintiff in the above-entitled action and on the affidavit of said plaintiff on file herein, and good cause appearing therefrom,

It is Hereby Ordered, Adjudged and Decreed that the defendant M. F. Goggans shall appear and show cause before this Court on the Fourth day of March, 1955, at the hour of 4:00 o'clock p.m. of said day, at the courtroom of this Court in Anchorage, Alaska, as to why he should not be adjudged guilty of contempt of this Court for his failure to comply with the orders of this Court entered in the above-entitled matter, including the order and decree of November 30, 1951, and subsequent orders, including the order of November 12, 1954.

It is Further Ordered that a certified copy of this order shall be served upon the defendant not later than 3 days before the hearing date upon the order to show cause hereinabove set forth.

Dated at Anchorage, Alaska, this 23rd day of February, 1955.

/s/ JOHN L. McCARREY, JR.,
District Judge.

[Endorsed]: Filed and entered February 23, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF DEFENDANT ON
ORDER TO SHOW CAUSE

United States of America,
Territory of Alaska—ss.

M. F. Goggans, being first duly sworn, deposes and says:

That he is the Defendant in the above-entitled action.

That on the 23rd day of December, 1954, he filed a petition for an Adjudication in Bankruptcy in the above-entitled Court and on that same day was adjudicated a bankrupt by said Court.

That the debt of the Defendant owing to Plaintiff was listed by Defendant in the schedule of debts and liabilities, in said bankruptcy proceedings.

That the Affiant has no funds or assets whatsoever from which to pay the debt or any part thereof, to which this contempt proceeding pertains.

/s/ M. F. GOGGANS.

Subscribed and sworn to before me this 8th day of March, 1955.

[Seal] /s/ GEORGE B. GRIGSBY,
Notary Public for Alaska.

My commission expires May 20, 1955.

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

By the terms of the decree entered November 30, 1951, the defendant was required to pay the plaintiff \$26,000 at the rate of \$500 a month. He is now in arrears in an amount approximating \$12,000.

On November 12, 1954, this court, by Judge McCarrey, ordered the defendant to pay to the plaintiff \$1,500 and interest on \$9,000, the amount then due her. There has been no compliance with this order. On February 23, 1955, the defendant was ordered to show cause why he should not be committed for contempt. He responded by affidavit averring that on December 23, 1954, he was adjudicated a bankrupt and that he has no funds or assets, and by making a collateral attack on the order of November 12, 1954. The hearing on the latest order was before me. At its conclusion I expressed the opinion, which I now reiterate, that I cannot redetermine the facts on which the order of November 12, 1954, is based. Precedent, tradition, and comity forbid that another judge of the same court should make an independent redetermination of questions previously determined. I am remitted, therefore, to the bare averments of the affidavit referred to, which I find insufficient to constitute a showing of good cause.

I conclude, therefore, that the failure of the defendant to obey the order referred to constitutes contempt and that he should be committed to the custody of the United States Marshal until he com-

plies with said order. Accordingly, an order in conformity herewith may be presented, with the further provisions that the defendant may have three days, computed according to Rule 6(a) of the Federal Rules of Civil Procedure, in which to pay the amount ordered to the plaintiff or to the clerk of this court, and that in default thereof he shall forthwith surrender himself to the United States Marshal in execution of the order entered, pursuant to this opinion.

Dated at Anchorage, Alaska, this 14th day of March, 1955.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 14, 1955.

In the District Court for the District of Alaska,
Third Division

No. A-7094

RETA OSBORN,

Plaintiff,

vs.

MARLIN FERRIS GOGGANS, Also Known as
M. F. GOGGANS,

Defendant.

ORDER

The above-entitled matter having come on regularly for hearing on the 10th day of March, 1955;

the plaintiff was personally present with Edward V. Davis of her attorneys and the defendant was personally present with George B. Grigsby, his attorney. Argument was had to the Court on behalf of the respective parties and the Court having taken the matter under advisement and having on the 14th day of March, 1955, entered memorandum opinion in the matter and being fully advised in the premises,

Now Therefore it is hereby ordered and adjudged as follows:

1. The showing made by the defendant in this matter is insufficient to constitute a showing of good cause and the failure of the defendant to obey the previous order of this Court constitutes contempt of this Court and the defendant should be committed to the custody of the United States Marshal until he complies with the order of this Court made on November 12, 1954.

2. The defendant may have a period of three (3) days computed according to Rule 6(a) of the Federal Rules of Civil Procedure to pay the sum of \$1,500.00 together with interest on the sum of \$9,000.00 at the rate of 6% per annum from the 1st day of January, 1954, either to the Clerk of this Court for the benefit of the plaintiff or to the attorneys for the plaintiff.

3. Defendant is further ordered hereafter to pay such interest as is provided in the order dated November 12, 1954.

4. In the event the defendant M. F. Goggans does

not make the payments as hereinabove provided within a period of three days computed according to Rule 6(a) of the Federal Rules of Civil Procedure he shall forthwith and without further proceedings of this court surrender himself to the United States Marshal for the District of Alaska, Third Division, in execution of this order.

Done in Open Court at Anchorage, Third Judicial Division, Territory of Alaska, this 15th day of March, 1955.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered March 15, 1955.

[Title of District Court and Cause.]

OBJECTION TO ORDER AND JUDGMENT

Defendant objects to the Order and Judgment rendered herein on the 15th day of March, 1955, wherein and whereby he was adjudged guilty of Contempt of the above-entitled Court, on the ground that this court was without jurisdiction to render said Order and Judgment.

Dated March 15, 1955.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Marlin Ferris Goggans, also known as M. F. Goggans, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order entered in this action on the 15th day of March, 1955, which said order from which this appeal is taken was as follows:

Order

The above-entitled matter having come on regularly for hearing on the 10th day of March, 1955; the plaintiff was personally present with Edward V. Davis of her attorneys and the defendant was personally present with George B. Grigsby, his attorney. Argument was had to the Court on behalf of the respective parties and the Court having taken the matter under advisement and having on the 14th day of March, 1955, entered memorandum opinion in the matter and being fully advised in the premises.

Now Therefore it is hereby ordered and adjudged as follows:

1. The showing made by the defendant in this matter is insufficient to constitute a showing of good cause and the failure of the defendant to obey the previous order of this Court constitutes contempt of this Court and the defendant should be committed to the custody of the United States Marshal until

he complies with the order of this Court made on November 12, 1954.

2. The defendant may have a period of three (3) days computed according to Rule 6(a) of the Federal Rules of Civil Procedure to pay the sum of \$1,500.00 together with interest on the sum of \$9,000.00 at the rate of 6% per annum from the 1st day of January, 1954, either to the Clerk of this Court for the benefit of the plaintiff or to the attorneys for the plaintiff.

3. Defendant is further ordered hereafter to pay such interest as is provided in the order dated November 12, 1943.

4. In the event the defendant M. F. Goggans does not make the payments as hereinabove provided within a period of three days computed according to Rule 6(a) of the Federal Rules of Civil Procedure he shall forthwith and without further proceedings of this court surrender himself to the United States Marshal for the District of Alaska, Third Division, in execution of this order.

Dated March 16, 1955.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

[Endorsed]: Filed March 16, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

We the undersigned jointly and severally acknowledge that we and our personal representatives

are jointly bound to pay Reta Osborn, plaintiff, the sum of Three thousand dollars (\$3,000.00).

The condition of this bond is that whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit from an order of this court, entered March 15, 1955, if this defendant shall pay the amount of the final judgment herein if his appeal shall be dismissed or judgment affirmed or modified, together with all costs that may be awarded, then this bond is void, otherwise to be and remain in full force and effect.

/s/ M. F. GOGGANS,
Defendant-Appellant.

/s/ JAMES E. NORENE,
Surety.

c/o GEORGE B. GRIGSBY.

United States of America,
Territory of Alaska—ss.

James E. Norene, being first duly sworn, deposes and says:

That he is a resident within the Territory of Alaska; that he is not a counselor or attorney at law, marshal, clerk of any court or other officer of any court; that he is worth the sum of Three thousand dollars (\$3,000.00), exclusive of property exempt from execution and over and above all his just debts and liabilities.

/s/ JAMES E. NORENE.

Subscribed and Sworn to before me this 17th day of March, 1955.

[Seal] /s/ GEORGE B. GRIGSBY,
Notary Public for Alaska.

My commission expires May 20, 1955.

Approved and stay granted this 29th day of
March, 1955.

/s/ GEORGE W. FOLTA,
District Judge.

Duly Verified.

[Endorsed]: Filed March 29, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

Good cause appearing therefor:

It Is Ordered:

That the time within which the defendant in the
above-entitled cause may file the record and docket
the appeal in the appellate court, is hereby extended
to and including May 5th, 1955.

Dated April 1st, 1955.

/s/ GEORGE W. FOLTA,
U. S. District Judge.

[Endorsed]: Filed and entered April 1, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The above-named defendant intends to rely on his
appeal on the following points:

1. That the Court was without jurisdiction to make the Order of November 12, 1954.

2. That the Court was without jurisdiction to issue the Order to Show Cause of February 23, 1955.

3. That the Court was without jurisdiction to make the Order of March 15, 1955, and erred in adjudging defendant guilty of contempt of court in failing to obey the order of the Court of November 12, 1954.

4. That the Court was without jurisdiction to make the Order of March 15, 1955, whereby the defendant was directed to pay the plaintiff certain sums of money, or in default of said payments, to surrender himself to the United States Marshal for the District of Alaska, Third Division, and erred in including said directions in said order.

5. That resort cannot be had to contempt proceedings to enforce the provisions of the decree of divorce filed herein on November 30, 1951, in so far as said provisions relate to the payments of money referred to in the preceding paragraph of this Statement of Points.

Dated April 14, 1955.

/s/ GEORGE B. GRIGSBY,

Attorney for Defendant and
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 10, of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, designated by the respective parties.

The papers herewith transmitted constitute the record on appeal from the order filed and entered in the above-entitled cause by the above-entitled Court on March 15, 1955, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ WM. A. HILTON,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: No. 14756. United States Court of Appeals for the Ninth Circuit. Marlin Ferris Goggans, also know as M. F. Goggans, Appellant, vs. Reta Osborn, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed May 4, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14756

MARLIN FERRIS GOGGANS, Also Known as M.
F. GOGGANS,

Appellant,

vs.

RETA OSBORN,

Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR PRINTING

The above-named Appellant hereby adopts as his Statement of Points upon which he intends to rely for appeal, and as his Designation of Record for Printing, the Statement of Points and the Designa-

tion and Supplemental Designation as appear in the typewritten transcript of the record on appeal.

/s/ GEORGE B. GRIGSBY,
Attorney for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed May 11, 1955.

No. 14756

United States
Court of Appeals
for the Ninth Circuit

MARLIN FERRIS GOGGANS, Also Known as M.
F. GOGGANS,

Appellant,

vs.

RETA ORBORN,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILE

APR 11 1956

PAUL P. O'BRIEN, CLERK



No. 14756

United States
Court of Appeals
for the Ninth Circuit

MARLIN FERRIS GOGGANS, Also Known as M.
F. GOGGANS,

Appellant,

vs.

RETA ORBORN,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

1875

1875

1875

1875

1875

1875

1875

1875

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavit of Plaintiff—Filed October 2, 1951 ..	59
Affidavit of Plaintiff—Filed October 10, 1951 ..	62
Affidavit of Plaintiff—Filed October 12, 1951. (Answer of Plaintiff to Affidavit of Defendant on Motion of Plaintiff to Set Case for Trial)	66
Affidavit of Plaintiff—Filed March 25, 1951. (In support of Motion for Order to Show Cause)	71
Affidavit of Plaintiff—Filed September 11, 1953	75
Designation of Additional Portions of Record on Behalf of Plaintiff	77
Designation of Additional Portions of Record on Behalf of Appellee	79
Memorandum Opinion and Decision Filed April 24, 1953	73
Minute Order—September 26, 1953. (Hearing on Order to Show Cause)	76
Restraining Order Pendente Lite—Filed August 10, 1951	60



ATTORNEYS OF RECORD

EDWARD V. DAVIS,
DAVIS, RENFREW AND HUGHES,
Box 477, Anchorage, Alaska,
Attorneys for Appellee.

GEORGE B. GRIGSBY,
Central Bldg., Anchorage, Alaska,
Attorney for Appellant.



[Title of District Court and Cause.]

AFFIDAVIT OF PLAINTIFF

(Oct. 2, 1951)

United States of America,
Territory of Alaska—ss.

Reta Osborn Goggans, being first duly sworn,
upon her oath deposes and says:

That your affiant and the defendant herein are the joint owners of a painting and contracting business and a retail paint, glass and wallpaper store situated in the Central Building, Third and G Streets, Anchorage, Alaska, known as the M. F. Goggans Co.; that since for some time prior to the inception of this action your affiant has been denied access to the records and files of said businesses, and since the inception of this action your affiant has only had fragmentary reports as to the financial status of the businesses above mentioned, and that your affiant is informed and believes and so alleges the facts to be that the defendant has, in violation of the stipulation on file herein, expended funds belonging to the businesses above mentioned for his own personal use, all to the detriment of the plaintiff, and that unless an early adjudication of this matter is had between the parties, that the defendant will continue, as affiant believes, to dissipate the funds of the said businesses in violation of this Court's order and the stipulation on file herein.

That to the best knowledge and belief of your affiant has, since the service on him of the restraining order in this action up to and including the 28th day of August, 1951, the defendant has dissipated funds of the businesses above mentioned, over and above that allowed by order of this Court and stipulation between the parties, in the amount of \$747.78, if not more.

/s/ RETA OSBORN GOGGANS,

Subscribed and sworn to before me this 29th day of September, 1951.

[Seal] /s/ JOHN C. HUGHES,
Notary Public for Alaska.

My commission expires: 4/9/55.

[Endorsed]: Filed Oct. 2, 1951.

In the District Court for the Territory of Alaska,
Third Division
No. A-7094

RETA OSBORN GOGGANS,

Plaintiff,

vs.

MARLIN FERRIS GOGGANS, Also Known as
M. F. GOGGANS,

Defendant.

RESTRAINING ORDER PENDENTE LITE

Upon consideration of the stipulation of the respective parties hereto and upon advice of counsel,

the Court having been fully advised in the premises,
Now Therefore

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the defendant shall pay to the plaintiff from the assets of the partnership business known as the M. F. Goggans Co. the sum of \$100.00 per week as a drawing until such time as a final settlement or adjudication of the above captioned cause is had between the parties, said sum to be paid by check or cash to the plaintiff at the office of Davis & Renfrew or mailed to the plaintiff in care of said firm at Box 477, Anchorage, Alaska.

2. That the defendant M. F. Goggans shall be entitled to receive and draw out of the assets of the M. F. Goggans Co. the sum of \$150.00 per week pending the final settlement or adjudication of the above captioned cause.

3. That the defendant is hereby restrained and enjoined from accosting, annoying or molesting the plaintiff in this action in any manner whatsoever, or from interfering with the plaintiff in her possession of the family home at 1547 H Street, Anchorage, Alaska, pending the final adjudication of the above captioned cause.

4. That the defendant is hereby restrained and enjoined, during the pendency of this action, from disposing of any of the assets of the M. F. Goggans Co. or from dissipating the cash or bank accounts of the said company other than such sales or ex-

penditures of the cash assets of the said company normal or customary in the usual course of trade thereof.

5. That each of the parties hereto is, during the pendency of this action, hereby ordered to deliver each to the other any mail or personal property now in their possession or hereafter to come into their possession and that each of the parties hereto is hereby ordered to refrain from writing checks on the bank accounts of the M. F. Goggans Co. or otherwise disposing of the assets of the said company except as is hereinabove ordered.

Done in Open Court at Anchorage, Alaska, this 10th day of August, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed and entered Aug. 10, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF PLAINTIFF
(Oct. 10, 1951)

United States of America,
Territory of Alaska—ss.

Reta Osborn Goggans, being first duly sworn, upon her oath deposes and says:

That she is the plaintiff in the above-entitled action; that on the 2nd day of October, 1951, a

stipulation between the respective counsel for the parties hereto was entered into and filed in the above-entitled cause, stipulating that the deposition of the defendant above named might be taken on the 4th day of October, 1951, at the hour of 7:45 p.m. upon oral examination for the purpose of discovery as set out in Rule 26 of the Federal Rules of Civil Procedure; that pursuant to said stipulation, notice of taking deposition was issued directing M. F. Goggans to appear before Lorraine Clarke, a Notary Public in and for the Territory of Alaska, at Room 133, Federal Building, Anchorage, Alaska, on the 4th day of October, 1951, at the hour of 7:45 p.m. for such examination; that on the 2nd day of October, 1951, subpoena duces tecum was issued out of this Court directing the defendant M. F. Goggans to bring with him at said time and place a true and correct financial statement of the business of the M. F. Goggans Co. for the year 1951 to and including the 30th day of September, 1951; that M. F. Goggans appeared as directed in the notice of taking of deposition at the time and place above mentioned but that he failed and refused to bring with him a true and correct financial statement of the business of the M. F. Goggans Co. for the year 1951 to and including the 30th day of September, 1951; that said M. F. Goggans testified under oath that he did not have the said financial statement for the reason that it had not been prepared and that he did not know when said financial statement would be prepared but that it would be prepared at some future date.

That on numerous and sundry occasions during the months of August and September, 1951, the attorney for the defendant and the defendant himself, through his servant, agent and employee, one Vernon H. Laird, bookkeeper for M. F. Goggans Co., promised the attorneys for the plaintiff that a financial statement for said M. F. Goggans Co. would be delivered to plaintiff's attorneys, but that said attorney for said defendant and said defendant personally have, all during said months of August and September, 1951, and on said 4th day of October, 1951, failed and refused to produce said financial statement, or any part thereof, although said bookkeeper informed plaintiff's attorneys on several occasions that said financial statement was being prepared and would be completed and delivered to plaintiff's attorneys within a few days.

That your affiant believes that the defendant M. F. Goggans is in fact in contempt of this Court by virtue of his failure to comply with the subpoena issued herein on the 2nd day of October, 1951.

That said M. F. Goggans admitted, while under oath at the time of taking said deposition, that he had used joint funds of the parties hereto to pay for his personal housing, in addition to the sum of \$150.00 per week allowed him by the Court in the restraining order dated August 10, 1951; that your affiant has personal knowledge that said defendant has dissipated the further sum of \$737.78 between the date of said restraining order and the

28th day of August, 1951, all in direct defiance, disobedience and disregard of the order of said Court dated August 10, 1951.

That said restraining order provided that any personal property in the possession of either party be delivered to the rightful owner thereof, but that the defendant has failed and refused to deliver to affiant a certain mimeograph machine in his possession, but has retained and withheld the same from the plaintiff herein, although plaintiff is the owner and entitled to the immediate possession thereof.

That your affiant believes that the said defendant is in fact in contempt of this Court by virtue of his disregard, defiance and disobedience of said court order dated August 10, 1951, and should be adjudged guilty of contempt for his failure to comply with said restraining order and said subpoena duces tecum.

/s/ RETA OSBORN GOGGANS.

Subscribed and sworn to before me this 8th day of October, 1951.

[Seal] /s/ JOHN C. HUGHES,
Notary Public for Alaska.

My commission expires: 4/9/55.

[Endorsed]: Filed Oct. 10, 1951.

said bookkeeper, according to the best knowledge and belief of your affiant under instructions from the defendant, has failed and refused to deliver said financial statement to the date hereof.

That for more than two years last past, and even during the time that affiant was actively engaged in managing the retail store operated by the parties hereto, said bookkeeper, acting on instructions from the defendant, has repeatedly refused to give plaintiff certain information from the books and records of said business.

That during the taking of the deposition of the defendant on the 4th day of October, 1951, defendant admitted, while under oath to tell the truth, that he has expended joint funds of the parties hereto for his personal housing, in direct disobedience, defiance and disregard of the restraining orders of the above-entitled Court; that when plaintiff herein examined the bank statements for said business for the month of August, 1951, she made a list of the checks written by the defendant which were in direct defiance, disobedience and disregard of said restraining orders, and said checks totalled \$747.78 in addition to and exclusive of a check for \$250.00 which the defendant gave to his attorney, all of which checks were not in the ordinary course of business of said M. F. Goggans Co., all to the great detriment of the financial investment of plaintiff herein.

That ever since the inception of the partnership between the plaintiff and the defendant, the said de-

fendant and the bookkeeper employed by the defendant against the expressed wishes of plaintiff, have made false and fraudulent entries and omissions in said books and records, to cover and bury the dissipation and squandering on the part of the defendant of the joint funds and assets of the parties hereto, all with the intent and purpose of defrauding and cheating the plaintiff of her rightful share of the profits of said business, and with the intent and purpose of avoiding the payment of the income taxes actually due from said business.

That your affiant has not been given access to the bank statements of said business for the month of September, 1951, but alleges that, according to the practice of said defendant for several years last past, he has dissipated and squandered many hundreds of dollars of joint funds of the parties hereto in drinking and hunting and fishing trips, during said September, 1951.

That the defendant remains away from the City of Anchorage, where said business is maintained, for many days each week and that during the last week of September, 1951, the defendant was absent from said City of Anchorage and said business for five days, on a duck hunting trip; that during the times that said defendant is away on such pleasure trips, said business is left without proper management and with no capable person in control of said business, but said business is left to the management of employees not capable of properly managing said business.

That since plaintiff was forced to leave said business on or about the 5th day of January, 1951, the defendant has, according to the sketchy and fragmentary information available to the plaintiff, added more than \$30,000.00 to the accounts payable of said business, to one creditor alone, and plaintiff has no knowledge of the added indebtedness to other creditors.

That the defendant and his attorney have delayed the trial of the above-entitled action in every conceivable manner, and your affiant prays this Honorable Court that the above-entitled action be set for trial at the earliest possible date, in order that the plaintiff be not further deprived of her just and rightful portion of the assets of said business, and in order that the defendant be not granted additional time within which to dissipate and squander the joint assets and cash of the parties hereto, as he has done in defiance of the restraining orders of this Court.

/s/ RETA OSBORN GOGGANS.

Subscribed and sworn to before me this 11th day of October, 1951.

[Seal] /s/ JOHN C. HUGHES,
Notary Public for Alaska.

My Commission expires: 4/9/55.

[Endorsed]: Filed Oct. 12, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF PLAINTIFF IN SUPPORT
OF MOTION FOR ORDER TO SHOW
CAUSE

United States of America,
Territory of Alaska—ss.

Reta Osborn, being first duly sworn, upon her oath, deposes and says:

That she is the plaintiff in the above-entitled action; that the decree of divorce entered in the above-entitled action on the 30th day of November, 1951, approved and adopted as a part thereof, the dissolution of partnership and property settlement agreement made between the parties hereto; that among other things, said agreement provided that the defendant pay to the plaintiff the sum of \$500.00 per month for a period of four years and four months from the date thereof; that the defendant has failed and refused to make said payments since the month of August, 1952, and is presently in default in the sum of \$3,500.00 in said payments.

That from said payments of \$500.00 per month to be received by the plaintiff from the defendant, the plaintiff was to pay the sum of \$250.00 per month toward retiring the mortgage on the real property set aside to the plaintiff by said property settlement and partnership dissolution agreement; that as long as payments were received from the defendant, said payments were made by the plain-

tiff according to the terms of said agreement; that the holder of said mortgage has threatened to foreclose the same unless said payments are brought up to date and the plaintiff is unable to meet said payments without the receipt of the moneys due and owing from the defendant, according to the terms of said partnership dissolution and property settlement agreement.

That the defendant is in contempt of this Court, as plaintiff verily believes, for his failure and refusal to comply with the terms and conditions of said decree of divorce and property settlement agreement, during the past seven months.

/s/ RETA OSBORN.

Subscribed and sworn to before me this 11th day of March, 1953.

[Seal] /s/ JOHN C. HUGHES,
Notary Public for Alaska.

My commission expires: 4/11/55.

[Endorsed]: Filed March 25, 1953.

In the District Court for the District of Alaska
Third Division

No. A-7094

RETA OSBORN GOGGANS,

Plaintiff,

vs.

MARLIN FERRIS GOGGANS, Also Known as
M. F. GOGGANS,

Defendant.

MEMORANDUM OPINION AND DECISION

Upon the motion of the plaintiff an Order was signed and filed herein on March 25, 1953, directed to the defendant and ordering him to show cause why he should not be held in contempt of court for his failure and refusal to comply with the terms of the Decree of divorce and property settlement and partnership dissolution heretofore made and filed in this case. Hearing was had thereon on April 7, 1953, and the defendant was examined at some length.

It appears without dispute that defendant is grossly in arrears in payment of the amounts which he agreed to pay in the property settlement agreement entered into between himself and the plaintiff and thereafter provided in the Decree of the Court. The defendant's testimony is to the effect that he has lost the business in which he and the

plaintiff were engaged prior to their divorce and has no funds out of which he can make the required payments. Shortly after the divorce between the parties hereto the defendant remarried. His present wife has two children by a former marriage.

While the defendant's testimony was not in every respect credible and while his demeanor on the witness stand manifested lack of complete candor, no substantial showing has been made that the defendant at the present time can make the payments required by the property settlement agreement and by the Decree. I have come to the conclusion that to commit him to prison for contempt until payments are made would serve no useful purpose and would in fact defeat the just demands of the plaintiff that the Decree be complied with.

Accordingly, the motion for punishment of the defendant for contempt is denied at this time and the hearing is continued until August 7, 1953, at four o'clock in the afternoon at which time further testimony may be taken, including the testimony of the defendant, with respect to the defendant's financial means and as to other factors which may be relevant to the issue here involved, the Court reserving the power to then commit the defendant for contempt if circumstances shall warrant.

It is further Ordered that the defendant appear in the courtroom at Anchorage, Alaska, on August 7, 1953, at four o'clock in the afternoon of said day and then and there submit himself to further

examination by counsel for either or both parties upon the issues raised by said motion.

Dated at Anchorage, Alaska, this 24th day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed April 24, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF PLAINTIFF

United States of America,
Territory of Alaska—ss.

Reta Osborn, being first duly sworn, upon her oath, deposes and says:

That she is the plaintiff in the above-entitled action; that the partnership dissolution and property settlement agreement incorporated in and made a part of the decree of divorce entered in the above-captioned matter on the 30th day of November, 1951, provided, among other things, that the defendant pay to the plaintiff the sum of \$500.00 per month until the sum of \$26,000.00 had been paid by the defendant; that the defendant has failed and refused to make said payments since the month of August, 1952, and has paid nothing whatsoever since said date, and that the defendant is now thirteen months in arrears in said payments, amounting to the sum of \$6,500.00.

That the defendant is steadily employed in the office of the Post Engineers and has been so employed since immediately following the hearing of this matter in April, 1953, and is in receipt of a monthly salary in the approximate amount of \$573.00.

That the defendant's present wife and her two children by a former marriage have returned to Seattle, Washington to live and the defendant therefore has no dependents to support and is well able to make regular payments to plaintiff herein.

That the defendant is well able to borrow sufficient funds with which to pay the arrearages due the plaintiff.

/s/ RETA OSBORN.

Subscribed and sworn to before me this 10th day of September, 1953.

[Seal] /s/ JOHN C. HUGHES.

Notary Public for Alaska.

My commission expires: 4/9/55.

[Endorsed]: Filed September 11, 1953.

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE
(Continued.)

Now at this time Hearing on Order to Show Cause is resumed in cause No. A-7094, entitled

Reta Osborn Goggans, Plaintiff, versus Marlin Ferris Goggans a/k/a M. F. Goggans, defendant came on regularly before the Court, Plaintiff present and with Edward V. Davis, of counsel, defendant present and with his counsel, George B. Grigsby, the following proceedings were had, to wit:

Argument to the Court was had by George B. Grigsby, for and in behalf of the defendant.

Argument to the Court was had by Edward V. Davis, for and in behalf of the plaintiff.

Argument to the Court was had by George B. Grigsby, for and in behalf of the defendant.

Whereupon, Court finds defendant guilty of contempt and sentences defendant to imprisonment until sum of \$1,500.00 is paid, and defendant given to 2:00 o'clock p.m. of Monday, September 28, 1953, to pay such sum or surrender himself to the United States Marshal.

Entered September 26, 1953.

[Title of District Court and Cause.]

**DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD ON APPEAL ON BEHALF
OF PLAINTIFF**

Comes now Reta Osborn, the above-named plaintiff, and designates additional portions of the record in the above-entitled matter as follows:

1. Restraining order pendente lite filed August 10, 1951.
2. Affidavit of plaintiff filed October 2, 1951.
3. Affidavit of plaintiff filed October 10, 1951.
4. Affidavit of plaintiff filed October 12, 1951.
5. Affidavit of plaintiff filed March 25, 1953.
6. Memorandum opinion and decision filed April 24, 1953.
7. Affidavit of plaintiff filed September 11, 1953.
8. Minute order filed September 26, 1953.
9. This designation.

DAVIS, RENFREW &
HUGHES,

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed April 25, 1955.

In the United States Court of Appeals
for the Ninth Circuit

No. 14756

MARLIN FERRIS GOGGANS, Also Known as
M. F. GOGGANS,

Appellant,

vs.

RETA OSBORN,

Appellee.

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD ON APPEAL ON BEHALF
OF APPELLEE

Comes now Reta Osborn, the above-named appellee, and designates additional portions of the record in the above-entitled matter in accordance with her designation served and filed in the District Court for the District of Alaska, Third Division, on the 25th day of April, 1955, to the same extent as though set out in full herein.

Dated at Anchorage, Alaska, this 12th day of March 1956.

DAVIS, RENFREW &
HUGHES.

Attorneys for Appellee.

By /s/ EDWARD V. DAVIS.

Affidavit of Service by Mail attached.

Receipt of copy acknowledged.

[Endorsed]: Filed March 14, 1956.



No. 14,756

IN THE
United States Court of Appeals
For the Ninth Circuit

MARLIN FERRIS GOGGANS, also known as
M. F. GOGGANS,

Appellant,

VS.

RETA OSBORN,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF OF APPELLANT.

GEORGE B. GRIGSBY,

Box 799, Anchorage, Alaska,

Attorney for Appellant.

FILED

NOV 18 1933

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
I. Jurisdictional Statement.....	1
II. Statement of Case and Questions Involved.....	3
1. Facts and Circumstances.....	3
2. Questions Involved and How Raised.....	6
III. Specifications of Error.....	7
IV. Argument	8
Conclusion	13

Table of Authorities Cited

Cases	Pages
Commission of Internal Revenue v. Tuttle, 89 F. (2d) 112	11
Fernandes v. Pitta, 117 P. (2d) 728.....	11
Ridenour v. Ridenour, 24 P. (2d) 419.....	9, 11
State ex rel. Foster v. Superior Court, 74 P. (2d) 479.....	11
State ex rel. Lang v. Superior Court, 30 P. (2d) 237.....	11
Tripp v. Superior Court, 214 P. 252.....	9
Tropp v. Tropp, 18 P. (2d) 385.....	10, 11

Statutes

Alaska Compiled Laws Annotated, 1949, Sections 35-2-71 to 35-2-76.....	2
New Title 28 U.S.C.A. Sections 1291 and 1294 (2).....	2

THE UNIVERSITY OF CHICAGO

THE EAST ASIAN LIBRARY

1207 EAST 58TH STREET

CHICAGO, ILL. 60637

THE UNIVERSITY OF CHICAGO

1980

THE EAST ASIAN LIBRARY

1207 EAST 58TH STREET

CHICAGO, ILL. 60637

THE UNIVERSITY OF CHICAGO

THE EAST ASIAN LIBRARY

1207 EAST 58TH STREET

CHICAGO, ILL. 60637

THE UNIVERSITY OF CHICAGO

THE EAST ASIAN LIBRARY

1207 EAST 58TH STREET

CHICAGO, ILL. 60637

No. 14,756

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARLIN FERRIS GOGGANS, also known as

M. F. GOGGANS,

Appellant,

vs.

RETA OSBORN,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF OF APPELLANT.

I.

JURISDICTIONAL STATEMENT.

The appellant was adjudged guilty of contempt of court by an Order of the District Court for the Territory of Alaska, Third Division, made and entered on March 15, 1955, and committed to the custody of the United States Marshal in the event he failed to make certain money payments to the appellee, in said order specified. T.R. pp. 46, 47, 48.

The Order adjudging appellant guilty of contempt was made after the conclusion of a hearing on an Order to Show Cause, made on February 23, 1955, wherein and whereby appellant was ordered to show cause why he should not be adjudged guilty of contempt of court for failure to comply with certain orders of said court theretofore made, including an order of November 12, 1954. T.R. p. 43.

The Order of November 12, 1954, required the appellant to show cause why he should not be dealt with for contempt of court, and further directed him to forthwith pay certain specified sums of money to the appellee. T.R. pp. 39, 40.

Notice of Appeal was filed March 16, 1955. T.R. pp. 49, 50.

A supersedeas bond having been filed a stay of proceedings was granted on March 29, 1955. T.R. pp. 50, 51, 52.

The District Court had jurisdiction of the case by virtue of Secs. 35-2-71 to 35-2-76 of the Alaska Compiled Laws Annotated, 1949.

The Appellate Court has jurisdiction by virtue of New Title 28, U.S.C.A. Sec. 1291 and Sec. 1294 (2).

II.

**STATEMENT OF CASE AND
QUESTIONS INVOLVED.**

1.

Facts and Circumstances.

On August 7, 1951, a suit for divorce was filed in the District Court for the Territory of Alaska, entitled,

Reta Osborn Goggans, Plaintiff,

vs.

Marlin Ferris Goggans, also

known as M. F. Goggans, Defendant.

T.R. pp. 3-6.

The plaintiff in said action is now Reta Osborn, the appellee herein, the defendant is the appellant.

On September 27, 1951, the defendant filed his answer and cross-complaint. T.R. pp. 8-17.

On October 2, 1951, the plaintiff filed her answer to the cross-complaint. T.R. pp. 17, 18.

The case was tried on October 29, 30 and 31, 1951, and on the 1st day of November, 1951. A decree was filed and entered on November 30, 1951, whereby the parties were divorced on the ground of incompatibility of temperament. T.R. pp. 33-35.

The parties were married on December 28, 1946, and since January 1, 1947, had been co-partners in business, under the firm name and style of M. F. Goggans Co.

In 1947 their business consisted of a painting contracting business. Since 1947 it consisted of a paint-

ing contracting business and a wholesale and retail paint business.

On November 2, 1951, the parties entered into an agreement for the dissolution of partnership. T.R. 20-29.

By the terms of this agreement the plaintiff, Reta Osborn Goggans, sold to the defendant, M. F. Goggans, all her right, title and interest in and to the partnership business and executed and delivered to him a bill of sale thereof.

In consideration thereof, the defendant, M. F. Goggans, agreed, in addition to other considerations, to pay to the plaintiff, Reta Osborn Goggans, the sum of \$500.00 per month for the period of four years and four months, a total sum of \$26,000, the payments to commence on November 10, 1951. T.R. p. 25.

By the terms of the decree of divorce this agreement for dissolution of partnership was affirmed and adopted as a property settlement between the parties, and, a duplicate original having been filed, was by reference made a part of the decree. T.R. p. 34.

Thereafter, and up to and including August, 1952, Goggans made the payments of \$500.00 per month, a total of \$5,000.00.

In August, 1952, by the terms of a contract with W. P. Fuller & Company he was compelled to surrender all his interest in the M. F. Goggans Co., and deliver possession of the business and assets thereof to Fuller & Company, and thereafter ceased making said monthly payments. T.R. 35, 36.

On November 3, 1954, a hearing was had in the District Court, on an order of the court theretofore made, requiring the defendant, Goggans, to show cause as to why he should not be dealt with for contempt of court. At the conclusion of the hearing on said Order to Show Cause, the trial judge delivered an oral opinion, which was transcribed and appears in the record. T.R. pp. 38-39.

Pursuant to said opinion, the court, on November 12, 1954, made an order adjudging that contempt proceedings did not lie at that time, and further ordering that the defendant pay forthwith to the plaintiff the sum of \$1,500.00 plus certain interest. T.R. pp. 39-40.

Thereafter on February 23, 1955, the defendant having failed to obey the said order of November 12, 1954, an Order to Show Cause was made by trial judge directing the defendant to show cause on March 4, 1955, as to why he should not be adjudged guilty of contempt of court for his failure to comply with the orders of the court entered in said matter, including the order and decree of November 30, 1951, and subsequent orders, including the order of November 12, 1954. T.R. p. 43.

The Order to Show Cause came on to be heard on March 10, 1955, before Judge George W. Folta, District Judge of the First Division of the Territory of Alaska, to whom the hearing of said matter was assigned by Judge John L. McCarrey, Jr., Judge of the Third Division. Judge Folta filed a Memorandum Opinion on said matter on March 14, 1955. T.R. 45-46.

On March 15, 1955, an order was made by Judge Folta adjudging the defendant guilty of contempt of court, and committed to the custody of the United States Marshal. T.R. 46, 47-48.

The decree of divorce, rendered November 30, 1951, did not by its terms state to which of the parties the divorce was granted. However, Conclusion of Law I. is, "That the defendant is entitled to a decree of the Court dissolving absolutely the bonds of matrimony heretofore and now existing between plaintiff and defendant." T.R. p. 32.

2.

Questions Involved and How Raised.

The questions involved on this appeal are,

1: Whether or not the court had jurisdiction to make the Order of March 15, 1955, whereby the defendant was directed to make certain payments of money to the plaintiff or in default thereof, surrender himself to the United States Marshal.

2: Whether or not resort could be had to enforce the provisions of the decree of divorce filed on November 30, 1951, in so far as the same related to the terms of the dissolution of partnership agreement, which was made a part of said decree. The question of jurisdiction was raised by Objection to the Order and Judgment of March 15, 1955. T.R. p. 48.

The question of resort to contempt proceedings to enforce the provisions of the decree is raised on this appeal.

III.

SPECIFICATIONS OF ERROR.

I.

The court erred in making the Order of March 15, 1955, wherein the defendant in a divorce action was adjudged guilty of contempt of court, and committed to the custody of the United States Marshal in the event he failed to make certain cash payments to the plaintiff in said divorce action, as directed in said order of March 15, 1955. T.R. pp. 46, 47, 48.

1. The order of March 15, 1955, was erroneous in that the court had no jurisdiction to make said order for the following reasons.

2. That said order directed the partial payment of a debt created by an agreement for the dissolution of a partnership entered into between the parties on November 2, 1951. T.R. pp. 20-29.

3. That said debt was not a debt in alimony, maintenance or support. That said debt was provable and dischargeable in bankruptcy proceedings, and the defendant was on December 23, 1954, adjudicated a bankrupt, and had included in his schedule of debts and liabilities, the debt owing to plaintiff in said divorce action by virtue of said dissolution of partnership agreement. T.R. p. 44.

4. That resort could not be had to contempt proceedings to enforce the provisions of a property settlement agreement, made in contemplation of a divorce, and which does not provide for the payment of alimony, or for maintenance or support of wife or child.

IV.

ARGUMENT.

The decree of divorce of November 30, 1951, did not direct the payment of alimony, or maintenance or support money.

The plaintiff did not ask for such relief in her complaint.

The dissolution of partnership agreement of November 2, 1951, was simply a property settlement, a contract of purchase and sale, wherein and whereby for a stipulated money consideration, M. F. Goggans bought from Reta Goggans, all her interest in a co-partnership business, theretofore owned by the parties as co-partners.

The divorce decree affirmed the property settlement agreement.

The decree was not a judgment for the payment of money. The debt was created by the agreement, not by the decree. If the agreement had not been made a part of the decree, Reta Goggans would have had the same legal remedies to enforce collection of payments due her under the terms of the agreement, as are accorded to every creditor. That the agreement was affirmed by the court and made a part of the decree gave her no additional remedy.

The decree of divorce together with the property settlement agreement, was not a judgment for money. Even if it were, an execution would have been the proper remedy, not contempt proceedings, at least not until proceedings supplementary to execution had

been invoked and the defendant ordered to make some specific performance, and failed so to do.

“Although there are apparently few cases bearing directly on the point, we think the statement of the law in the Scherr case is supported by the weight of authority and reason.

A decree for alimony differs from an ordinary judgment for money. The latter only determines an amount owing, while the former directly commands the defendant to pay. * * *

To be enforceable by contempt proceedings there must be a definite and unconditional order to pay alimony as such.”

Ridenour v. Ridenour, 24 P. (2d), p. 419 (1-3).

In the paragraph preceding the above quoted excerpt from the opinion, *Tripp v. Superior Court*, 214 P. 252, 253, is quoted to the contrary. In the *Tripp* case the opinion states,

“The court had full power to deal with the matters covered by the agreement and to render its judgment therein, at least to the extent of making proper provision for the support and maintenance of the wife, provided that it were first ascertained that petitioner was guilty of the charges made against him in the divorce action.”
Opinion (1) p. 253.

In the present case it was not ascertained that the defendant was guilty of the charges made against him in the divorce action. On the contrary Conclusion of Law I. stated that the defendant was entitled to the decree. T.R. p. 32.

Divorced husband's agreement to pay wife \$50,000.00 in annual installments held "debt incurred in effecting property settlement" dischargeable in bankruptcy proceedings.

Tropp v. Tropp, 18 P. (2d) 385, syllabus 1. In the *Tropp* case there was an agreement for the payment to the wife of \$250.00 for support and maintenance, and the sum of \$50,000.00 in yearly installments as a property settlement agreement. The whole agreement was embodied into and affirmed by the decree.

By bankruptcy proceedings the defendant was released from the part of the debt which provided for the payment of \$50,000.00 annually in installments, as a property settlement. The trial court held that the property settlement liability was a proven and dischargeable debt in said bankruptcy proceedings, stating in its opinion,

"Taking the agreement by the four corners, it appears that it was essentially an agreement made for the purpose of effecting a property settlement with *provision incidentally made* (italics ours) for maintenance and support of appellant during the time provided for the completion of such property settlement. We are therefore of the opinion that the trial court correctly concluded that the only liability for 'maintenance and support' within the meaning of the Bankruptcy Act was the liability for the monthly payment, and that the remaining liability for the payment of the \$50,000.00 was a 'debt' from which respondent was released."

Tropp v. Tropp, *supra*, Opinion (1, 2) p. 386.

In the present case there was no provision in the dissolution agreement for maintenance and support. The agreement related solely to a property settlement and created a debt dischargeable in bankruptcy. The decision in the *Tropp* case is affirmed in *Fernandes v. Pitta*, 117 P. (2d) 728 (3) 730.

The decision in the *Ridenour* case, *supra*, is strongly affirmed in *State ex rel. Lang v. Superior Court*, 30 P. (2d) 237. Also in *State ex rel. Foster v. Superior Court*, 74 P. (2d) 479.

Orders for payment of alimony can be enforced by contempt proceedings, but other orders for payment of money are not so enforceable.

Commissioner of Int. Revenue v. Tuttle, 89 F. (2d) 112, Opinion (1-6) p. 115.

The appellant appeared in the District Court, J. L. McCarrey, Jr., presiding, on November 3, 1954, upon an Order to Show Cause why he should not be held in contempt of court because of his failure to comply with the decree of November 30, 1951.

Transcript of Opinion T.R. pp. 38-39. In this opinion it was conceded that the decree did not relate to the payment of alimony, that the contempt proceeding did not lie at that time.

This was a virtual dismissal of the contempt proceeding. Nothing else was before the court. Judge McCarrey seems to have taken the view that because there was no specific direction for the payment of money in the decree, he could remedy that defect by an order specifically directing such payment, which

he proceeded to do both in his opinion and in his Order of November 12, 1954. T.R. pp. 39, 40.

Judge McCarrey did not order the payment to be made as alimony, and could not have done so, for that would have constituted a modification of the decree, without notice. The decree contained no provision directing the payment of money, either as alimony, or as payment on the debt.

The appellant, having failed to comply with Judge McCarrey's order of November 12, 1954, and having been adjudged a bankrupt on December 23, 1954, was, on February 23, 1955, ordered to show cause why he should not be adjudged guilty of contempt of court. A hearing on the latter order was had on March 10, 1955, Judge Folta substituting for Judge McCarrey. The matter before Judge Folta had not been pre-determined by Judge McCarrey, as indicated in Judge Folta's Memorandum Opinion, T.R. pp. 45, 46. The only thing determined by Judge McCarrey was that an Order to Show Cause should issue. Judge Folta sat in place of Judge McCarrey, had power to do anything that Judge McCarrey could have done. Judge McCarrey's opinion of November 5, 1954, indicates that upon presentation of the decisions cited to this appellate court, Judge McCarrey would have dismissed the contempt proceeding, which Judge Folta probably would have done had he not mistakenly assumed that to have done so would have been to reverse Judge McCarrey.

CONCLUSION.

It is submitted that the judgment of the trial court should be reversed.

Dated, Anchorage, Alaska,
November 8, 1955.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Appellant.



No. 14,756

IN THE

United States Court of Appeals
For the Ninth Circuit

MARLIN FERRIS GOGGANS, also known as
M. F. GOGGANS,

Appellant,

VS.

RETA OSBORN,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF OF APPELLEE.

DAVIS, RENFREW & HUGHES,

Box 477, Anchorage, Alaska,

Attorneys for Appellee.

FILED

APR -5 1956



Subject Index

	Page
I. Statement relating to pleadings and jurisdiction.....	1
II. Statement as to pleadings and facts.....	2
III. Question for determination.....	10
IV. Summary of argument.....	10
V. Argument	11
VI. Conclusion	30

Table of Authorities Cited

Cases	Pages
Commissioner of Internal Revenue v. Tuttle, 89 Fed. (2d) 112.....	17, 19
Dean v. Dean, 300 Pac. 1027, 86 ALR 79, 136 Ore. 694....	27
Ex parte Weiler, 289 Pac. 645, 106 Cal. App. 485.....	27
Fernandes v. Pitta, 117 Pac. (2d) 728, 47 Cal. App. (2d) 248.....	16
Lazar v. Superior Court, 107 Pac. (2d) 249, 16 Cal. (2d) 617	24
Miller v. Superior Court, 9 Cal. (2d) 733, 72 Pac. (2d) 868	27
Ridenour v. Ridenour, 24 Pac. (2d) 419, 174 Wash. 152.17, 18, 19	
Sessions v. Sessions, 178 Minn. 75, 226 N.W. 211.....	27
Seymour v. Seymour, 64 Pac. (2d) 168, 18 Cal. App. (2d) 481.....	24
Solomon v. Solomon, 5 So. (2d) 265, 149 Fla. 174.....	26
State ex rel. Foster v. Superior Court, 193 Wash. 99, 74 Pac. (2d) 479.....	17, 18
State ex rel. Lang v. Superior Court, 176 Wash. 472, 30 Pac. (2d) 237.....	17, 18
Sullivan v. Superior Court, 72 Cal. App. 531, 237 Pac. 782	27
Tripp v. Superior Court, 214 Pac. 252, 61 Cal. App. 64....	22, 29
Tropp v. Superior Court, 18 Pac. (2d) 385, 129 Cal. App. 62	16

Textbooks

Black's Law Dictionary.....	20
154 American Law Reports 443.....	21

Statutes

48 USCA 101.....	1
28 USCA 1291, 1294.....	2
53-1-1 ACLA 1949.....	1
55-5-1 to 55-5-16 ACLA 1949.....	1

TABLE OF AUTHORITIES CITED

iii

	Page
56-5-13 (6) ACLA 1949.....	19
56-5-13 (7) ACLA 1949.....	14
Remington's Revised Statutes of the State of Washington, Sec. 988	19

Rules

Federal Rules of Civil Procedure.....	2
---------------------------------------	---



No. 14,756

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARLIN FERRIS GOGGANS, also known as
M. F. GOGGANS,

Appellant,

VS.

RETA OSBORN,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF OF APPELLEE.

I.

**STATEMENT RELATING TO PLEADINGS
AND JURISDICTION.**

This appeal was taken by the appellant (defendant in the lower court) from an order entered by the District Court for the Territory of Alaska, Third Division, by Folta, District Judge, on the 15th day of March, 1955, holding the appellant, Marlin Ferris Goggans, to be in contempt of Court.

Jurisdiction of the District Court is based on 48 USCA 101 (53-1-1 ACLA 1949 and on 55-5-1 to 55-

5-16 ACLA 1949). Practice and procedure in the District Court is controlled by the Federal Rules of Civil Procedure.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28 USC Sections 1291 and 1294 and is governed in procedural matters by the Federal Rules of Civil Procedure.

II.

STATEMENT AS TO PLEADINGS AND FACTS.

The District Court action was for divorce and was commenced on the 7th day of August, 1951. The complaint prayed for divorce, for temporary support for the plaintiff in the amount of \$100.00 per week, that the property rights of the parties be determined by the Court and that the plaintiff be restored to her maiden name of Reta Osborn. (R 5.)

On August 10, 1951 the parties entered into a stipulation concerning support of the parties pending final settlement or adjudication of the divorce. (R 6.) The Court entered a restraining order pendente lite on the 10th day of August, 1951. (R 60.) Defendant filed an answer and cross-complaint. (R 8.) This answer, among other things, admits that the plaintiff, for a long time prior to the separation of the parties and to the commencement of the action, had been drawing \$100.00 per week as household expenses but denies that plaintiff was entitled to that sum. (R 11.) The cross-complaint requested a divorce on the

grounds of incompatibility and cruelty and alleged that defendant desired the Court to make an equitable adjustment of the financial status of the parties and an equitable and final adjustment of the business affairs and property rights of the parties. (R 17.) Answer to the cross-complaint is found at R 17.

About the second day of October, 1951, plaintiff filed a motion to set the divorce cause for trial. She supported such motion with an affidavit dated October 2, 1951. (R 59.) Defendant filed answering affidavit. (R 18.) Plaintiff then filed an affidavit on October 10, 1951 (R 62), which discloses that subpoena duces tecum was issued out of the District Court directing the defendant to bring certain financial statements of the business theretofore operated by the parties at the time of examination of the defendant by deposition and that defendant appeared but failed and refused to bring the financial records as requested and that in his deposition defendant under oath admitted that he had used joint funds belonging to the parties to pay for his personal living expenses and housing in addition to the sum of \$150.00 a week allowed by the restraining order and that defendant had expended certain other funds in violation of such order. This affidavit was not controverted by defendant.

The divorce case was tried on the 29th, 30th and 31st days of October, and the 1st day of November, 1951. (R 30.) Thereupon, the parties and their attorneys agreed upon a settlement of the rights of the parties and entered into an agreement denom-

tained therein were expressly set forth as a part of this decree." (R 34.)

Defendant complied with the decree until the month of August of 1952. At that time he voluntarily, under the terms of an agreement executed between W. P. Fuller & Co. and himself, turned over all of his property to W. P. Fuller & Co. The terms of the agreement with Fuller are not disclosed. (R 36.) In August 1952 defendant ceased making the payments required by the terms of the agreement and the decree. He has made no effort to comply with the decree since that time, except that on one occasion he paid \$1,500.00 to avoid imprisonment for contempt. (R 41.)

On or about March 25, 1953, plaintiff filed a motion with the District Court to require the defendant to show cause as to why he should not be held in contempt of Court for not making the payments as ordered by the Court in the decree. In support of such motion plaintiff, on the 25th day of March, 1953, filed an affidavit. From such affidavit it appears that the failure of the defendant to make the payments required by the decree made it impossible for plaintiff to make the payments upon the mortgage which encumbered the family home and that the holder of the mortgage had threatened foreclosure unless the payments were made. (R 72.) In reply to that affidavit the defendant filed his affidavit dated April 4, 1953, in which he stated that he had voluntarily transferred his property to W. P. Fuller & Co. and claimed that he was without funds or financial resources to

make the payments required by the order of the Court. (R 36.) In reply to the defendant's affidavit above mentioned, the plaintiff filed an affidavit on the 7th day of April, 1953, to the effect that from the manner of living of the defendant he should be able to comply with the previous order of the Court. (R 37-38.)

On the 24th day of April of 1953, the District Judge entered his memorandum opinion and found that at the hearing the defendant manifested a lack of complete candor and that it appeared that the defendant's testimony was not credible in every respect but found that no substantial showing had been made that the defendant could make the payments required by the decree at that time and further found that it would serve no useful purpose at that time to commit him for contempt, but that such commitment in fact would defeat the just demands of the plaintiff for compliance with the terms of the decree. The Court continued the matter for a period of six months for further hearing and reserved the power to commit the defendant for contempt at that time if circumstances should warrant. (R 74.) The Court in that order specifically ordered the defendant to appear on August 7, 1953, to submit himself to further examination upon the issue raised by the motion for contempt. (R 74.)

On September 11, 1953, the plaintiff filed an affidavit which alleged that the defendant had been steadily employed since immediately following the hearing held in April and that he was receiving a monthly salary of approximately \$573.00. (R 76.)

The matter was again heard on the 26th day of September, 1953, on the order to show cause. Both parties were present and testimony was taken. The Court found defendant guilty of contempt of court and sentenced him to imprisonment until the sum of \$1,500.00 was paid. The order gave him a period of two days to make such payment or to surrender himself to the United States Marshal. (R 77.) Defendant paid the sum of \$1,500.00 as ordered. (R 41.)

Defendant made no further payments. He was cited to appear before the District Court on November 5, 1954. At that hearing defendant argued that the Court had no power to cite him for contempt because, as he contended, the payments in question were the result of agreement and were not alimony. (R 39.) This contention had not been raised in previous proceedings. The Court found that defendant had not shown that he was not in position to make the payments required by the terms of the decree and by order entered November 12, 1954, directed the defendant to pay forthwith to the plaintiff the sum of \$1,500.00, together with interest at the rate of 6% per annum on the unpaid portion of the home mortgage from the 1st day of January, 1954, and that the defendant should pay interest on the mortgage accruing thereafter. (R 40.)

The defendant refused to comply with the order of the Court. Thereupon he was again cited to show cause as to why he should not be held in contempt of court. In the affidavit supporting her request for order to show cause plaintiff alleged that she had

received numerous letters written by the holder of the mortgage against the home and that unless payments were made that foreclosure of the mortgage was imminent. (R 42.) This affidavit also stated that defendant was regularly employed at a salary in excess of \$6,000.00 per year and that the defendant had refused to make the payments as ordered by the Court and had stated that he did not intend to make such payments. (R 42.)

Defendant answered the order to show cause with an affidavit filed March 8, 1955. (R 44.) This affidavit makes no denial of any of the matters set forth in plaintiff's affidavit. It alleges that defendant had been adjudicated a bankrupt on December 23, 1954, and that he had listed the indebtedness owing to the plaintiff in his schedules of debts and liabilities in the bankruptcy proceedings. It also alleged that defendant had no funds with which to pay the debt or any part thereof. (R 44.)

After hearing arguments on the matter the Court entered its order on March 15, 1955, finding that the defendant was in contempt of the Court and should be committed to the custody of the United States Marshal until he complied with the order of the Court made on November 12, 1954. Opinion of the Court is found at page 45 of the record and the order at page 46 thereof. Defendant filed objections and filed notice of appeal. (R 48, 49.)

For the information of this Court appellee states that defendant filed application for discharge in bankruptcy in the Bankruptcy Court. This application

was resisted by appellee. Under date of March 5, 1956, the Bankruptcy Court entered its order denying discharge of the defendant. No application for review of that order has been filed.

III.

QUESTION FOR DETERMINATION.

As appellee views this matter, the sole question for determination by this Court is as to whether the District Court for the Territory of Alaska, Third Judicial Division, did or did not have jurisdiction to deal with the defendant for contempt of that Court at the time of the entry of its order dated March 15, 1955.

IV.

SUMMARY OF ARGUMENT.

The parties to this action intended that their agreement of November 1, 1951, should be filed in the divorce case then pending between the parties. They intended that such agreement should be considered by the Court and that the agreement, at the discretion of the Court, by reference might be made a part of the final decree of divorce. The agreement was intended to settle all claims between the parties, including those arising out of the business theretofore conducted by the parties, and those arising out of the marriage relationship existing between the parties. The agreement was considered by the Court and was

adopted by the Court and by reference was made a part of the divorce decree. The decree specifically provided that each of the parties to the action should be bound by all of the provisions of the agreement to the same extent as though the agreement were set out in full in the decree. The defendant has been specifically refused a discharge in bankruptcy and cases involving discharges in bankruptcy have no application here. The defendant having failed and refused to comply with the orders of the Court is subject to being dealt with for contempt of Court. The payments to be made by the defendant were for the support and maintenance of the plaintiff whatever they may have been called. Defendant has breached his agreement but also in addition to breaching the terms of the agreement, he has specifically refused to comply with lawful orders of the Court. Contentions of the defendant that this proceeding is merely a proceeding to attempt to collect a debt by contempt proceedings are not justified by the record.

V.

ARGUMENT.

The parties to this action were husband and wife. During their marriage they acquired and operated a certain business. The value of this business is not shown by the record, but it appears as a matter of record that at the time of the commencement of this action, and for the preceding seven or eight months, the plaintiff had been drawing for her living and

household expenses the sum of \$100 per week. The amount drawn by the defendant during this period is undisclosed but the parties stipulated at the commencement of the action that the defendant could draw \$150.00 per week from the business and that plaintiff could continue to draw \$100.00 per week. Accordingly, it appears that the value of the business was considerable.

During the course of the trial the parties agreed upon a settlement of their property and marital rights. The agreement provided that all of the business and the property belonging to the parties was transferred to the defendant, save and except a 1947 Pontiac automobile and the family home which were given to the defendant. The family home was encumbered by a mortgage to the extent of \$13,000.00. The agreement made no provision for mortgage or other security for the payment of the moneys to be paid to plaintiff by the defendant, or for the payment of the moneys necessary to clear the mortgage against the family home. However, it is clear from the agreement that the intention was that the plaintiff would receive her home free and clear of encumbrances had the defendant lived up to his agreement. It is also clear from the agreement that the parties intended that the agreement should be considered by the Court in the pending divorce action, and that the Court at its discretion could adopt the agreement made by the parties as its order concerning the settlement of the rights of the parties. While the agreement is called a property settlement agreement, it was also a settlement of the marital rights of the parties.

The agreement was presented to the Court for its consideration and was adopted by the Court and, as intended by the parties, it was by reference made a part of the decree of the Court. The decree provided that each of the parties should be bound by all the terms and provisions of the agreement to the same extent as though the same were set out in full in the decree.

The plaintiff performed her part of the agreement and the defendant received all that was due to him by the agreement.

The defendant performed his part of the agreement for a period of about nine months. At that time he voluntarily disposed of all of his property and ceased to perform his part of the agreement as required by the decree. By his own actions he made it impossible for the plaintiff to enforce her rights by execution. Subsequently, defendant was adjudicated a voluntary bankrupt. His attitude in this matter has been to admit his liability under the decree of the Court but to refuse compliance with that decree and to dare the plaintiff and the Court to do something about his refusal. On at least two occasions he has been found guilty of contempt by the District Court because of his blatant refusal to obey the order of the Court. On another occasion he was inferentially found guilty of contempt but the Court refused to commit him because at that time it appeared the commitment would serve no useful purpose, and in fact would defeat "the just demands of plaintiff that the decree be complied with". Now he comes before this

Court and argues that because he has made it impossible by his own actions for the plaintiff to collect the amount due to her and because, as he claims, the amount due is a debt, and not money due for alimony, that he cannot be forced to comply with the orders of the Court by contempt process.

Appellee believes that on the record there is no question at all but that the District Court had jurisdiction and the power to deal with the defendant for contempt of that Court and that the order of the District Court holding defendant in contempt should be sustained.

In spite of the fact the findings of fact declare that the defendant is entitled to the divorce, there is no finding either expressly or by implication that plaintiff was at fault in the matter. If there is any doubt on the question of fault appellee calls the Court's attention to Title 56-5-13 ACLA 1949 § (7) which provides that in a divorce decree the Court shall have power

“* * * to change the name of the wife when she is not the party in fault.”

The Court in this case changed the name of the wife.

This case does not involve a situation where the parties entered into an agreement and divorce was thereafter taken by default, or where the defendant may have had any doubt at all concerning the decree entered or its effect. This action was contested and was actually tried over a period of four days. Thereupon, the parties agreed on a settlement of their vari-

ous rights, subject to the approval of the Court, presented their agreement to the Court for its approval and the agreement was approved and adopted by the Court, and the Court specifically ordered both parties to comply with the agreement to the same extent as though it were set out in full in the decree.

This is not a case in which the defendant has been discharged in bankruptcy. He requested discharge and the discharge was specifically refused. So far as this case is concerned the defendant stands as if the bankruptcy proceeding had not been commenced.

This is not a case, as alleged by the appellant in his brief, where the parties simply made a contract of purchase and sale and where the defendant purchased the interest of the plaintiff in a certain business. The parties intended that their agreement should be considered and confirmed by the Court and that the agreement should be made a part of the decree of the Court. The only possible conclusion is that the parties and the Court intended something by that procedure. Making the agreement a part of the decree was not effective for any purpose and accomplished nothing if one were to accept the argument of appellant. Appellee believes that it is apparent from the record that the particular purpose of the parties, and of the Court, in making the agreement a part of the decree, was that the Court might require enforcement of the agreement, as embodied in its decree, against either of the parties, by contempt proceedings if that should become necessary.

be distinguished on the law and on their facts from the situation in question on this appeal.

The *Ridenour* case, above cited, is a leading Washington case on this point and was cited by the other two Washington cases cited in appellant's brief. A reading of that case will disclose that the Court held that the decree did not sufficiently set forth or incorporate the agreement in question so that the decree could be the basis for a contempt action. Having so held, the Court then proceeded to state that an agreement of the parties could not be enforced by contempt proceedings unless it involved *alimony as such*. We believe that the latter statement was dicta, as will be disclosed by a reading of the case. In its decision, the Court used the following language:

“In the case at bar the agreement to pay was not unconditional; nor was it incorporated in or made a part of the decree. The recital in the decree, that the agreement was made a part of it, was ineffectual, because at the time the decree was signed the agreement was not a part of the record.”

It should be noted that the *Ridenour* case concerned a decree secured by default. The facts in the *Ridenour* case were so different from the facts of this case that the *Ridenour* case is worthless as an authority in this case.

In the *Lang* case, above cited, it was conceded that the agreement in question was an agreement in settlement of property rights, and that under the specific provisions of the Washington Code that a decree con-

cerning the property rights could not be made the basis for a contempt action for failure to comply with the decree. The *Ridenour* case was cited, without analysis, for the proposition that no contempt proceedings would lie except as to a decree involving alimony or support.

The *Foster* case, above cited, involves a state of facts in which no agreement is involved, but in which the Court specifically divided the property of the parties and retained jurisdiction to modify the decree by transferring particular property to the wife, or by requiring conveyance of property to the wife, and imposed specific liens forecloseable as a chattel mortgage upon all of the husband's property. That case, too, declared that under the authority of the *Ridenour* case, and under the particular provisions of the Washington Statute, enforcement of a decree settling property rights could not be enforced by contempt proceedings. The particular law in question was cited as being Remington's Revised Statutes, Sec. 988. (Appendix *1.) No such statute of the Territory of Alaska has been cited by appellant or found by appellee. On the contrary, the Alaska Statute (56—5-13 A.C.L.A. 1949 sub-paragraph 6, Appendix *2). It also appears that the wife in the *Foster* case had completely adequate remedies to enforce her rights without resort to contempt proceedings.

The case of *Commissioner of Internal Revenue v. Tuttle*, above cited, involved an agreement whereby the husband placed certain property in trust for the wife. The Commissioner of Internal Revenue claimed that

the proceeds of such trust were in fact alimony and should be included by the husband in his income tax return. The Court held that the proceeds in question did not constitute alimony and that, accordingly such proceeds were not taxable to the husband. Appellee believes that a mere reading of the case will demonstrate that it is no authority for the position taken by appellant in the current case.

Conceding, for the purpose of argument, that the Washington rule is to the effect that a decree involving a property settlement agreement cannot be enforced by contempt proceedings, appellee believes that such rule is not the law of Alaska and that in any case under the facts and circumstances disclosed by this record, that the District Court had full and complete jurisdiction and power to deal with the defendant for contempt of the Court. The word "alimony" by definition means money to be paid for support and maintenance of a party to a divorce or separate maintenance action. (See Black's Law Dictionary "alimony.")

Appellant in his brief alleges that plaintiff did not ask for alimony or maintenance or support money in her complaint. As a matter of fact, in paragraph IV of the complaint, plaintiff stated that she was entitled to the sum of \$100.00 per week *for her living expenses* from the business belonging to the parties, and that such sum had been agreed upon by the parties. She had been drawing \$100.00 a week for such purpose and the parties stipulated that plaintiff should continue to receive \$100.00 a week until final adjudica-

tion of the action. That stipulation was confirmed by the order pendente lite. By the terms of the agreement settling the rights of the parties, as confirmed by the Court, plaintiff was to receive the sum of \$250.00 per month for a period of four years, and was to receive a further sum of \$250.00 per month to be used in clearing the mortgage which encumbered her home. Can it be said that either of these payments was not a reasonable sum to be paid toward the support and maintenance of the plaintiff, or that it was not in fact intended that such payments were to be for the support and maintenance of the plaintiff? We think not. We further believe that the fact that the agreement and the Court order did not denominate the payments as being alimony or support money is not controlling. We believe that the Court should and will look at the entire record and that it will be apparent that the intention of the parties and of the Court was that the money to be paid by defendant was to be paid for the support and maintenance of the plaintiff and for the purpose of giving her an unencumbered home where she might live. We think it further appears without dispute that by the actions of the defendant the plaintiff has been unable to make the mortgage payments and will eventually lose her home unless the defendant is required to make the payments to clear the mortgage.

Appellee calls the Court's attention to an extensive annotation in 154 A.L.R. beginning at page 443. This annotation is entitled "Provision in Divorce or Separation Decree Incorporating or Based Upon Agree-

ment for Alimony or Support as Enforceable by Contempt Proceedings.” This annotation is exhaustive and sets forth the various propositions and contentions which have been advanced in contempt cases, including those advanced by the appellant in this case. Appellee further calls attention to various cases which she believes sustain the jurisdiction of the lower Court in this matter.

The case of *Tripp v. Superior Court* was decided by the District Court of Appeal of the State of California in 1923 and is found at 214 Pac. 252. The facts of that case are very similar to the facts here being considered. By settlement agreement, made prior to the commencement of an action for divorce, the husband agreed that he would convey certain property to his wife and that he would pay certain indebtedness against one parcel of such property. The agreement specifically provided that it should be made subject to the approval of the Court and the divorce decree adopted the agreement of the parties. The husband transferred the property in question but refused to pay the indebtedness against the property. He was cited for contempt and was found guilty of contempt because of his refusal to make the payments as agreed by the parties and as ordered in the decree. The contempt order provided that the defendant could purge himself from contempt by making a partial payment on the amount due on the indebtedness. On appeal the husband contended that the decree did not specifically order him to pay the amount of the indebtedness men-

tioned in the agreement. The Court conceded that neither the interlocutory decree or the final decree contained any specific order concerning the payment. In overruling the petitioner's contention, the Court, at page 253, used the following language:

“The agreement recited the fact that a divorce action was pending between the parties, and contained a formal stipulation that it should be subject to the approval of the court and that, when so approved, it should be embodied in the decree, in the divorce action. This stipulation surely contemplated that the terms of the agreement, when it should be embodied in the decree, should have the compelling power of the court behind its every covenant. The court had full power to deal with the matters covered by the agreement and to render its judgment thereon, at least to the extent of making proper provisions for the support and maintenance of the wife, provided that it were first ascertained that petitioner was guilty of the charges made against him in the divorce action. Notwithstanding this power of the court, the parties undertook to stipulate a decree as to the property matters, subject, under the law as well as under the agreement, to the approval of the court. This approval was evidenced by the fact that the agreement was incorporated in terms in both the interlocutory and final decrees, preceded in each instance by the statement that the agreement was made part of the decree. Under these circumstances we are convinced that the terms of the agreement, except insofar as they were executed either before or at the time of the interlocutory decree, became enforceable as mandates of the court.”

The language used is equally applicable to the present case.

The case of *Seymour v. Seymour* was decided by the District Court of Appeal of the State of California in the year 1937 and is found at 64 Pac. (2d) 168. The husband in that case, after executing a property settlement agreement, secured a divorce. The decree approved the agreement of the parties. The husband refused to make the payments required by the agreement and by the decree. He was cited for contempt and then moved to modify the decree. It was argued, on appeal, that the Court was without jurisdiction to enter a decree requiring the husband to make payments of money after the entry of the decree under the contention that the divorce was granted to him and not to the wife. He also questioned the power of the Court to compel money payments by means of a contempt proceeding. The Court held that the divorce Court had jurisdiction to make the order in question and, accordingly, had the right to enforce its order by citation in contempt.

The case of *Lazar v. Superior Court* was decided by the Supreme Court of California in 1940 and is found at 107 Pac. (2d) at page 249. In that case the parties had agreed upon a settlement whereby the husband was to pay the wife \$130.00 per month, during her lifetime, or until she should remarry and which provided that the provisions of the agreement were to be incorporated in any decree of divorce between the parties. The wife secured a divorce, the agreement was approved by the Court and made a part of the decree.

The decree by its terms specifically provided that the wife was not entitled to any maintenance, support or alimony. The husband failed to make the agreed payments and was cited for contempt. At the hearing on the contempt citation the Court ordered petitioner to pay certain moneys then in his possession to his former wife. The husband refused to obey. The Court adjudged him to be in contempt. He then took certiorari proceedings to review the contempt order. He argued before the Supreme Court that the divorce decree provided that the wife was not entitled to maintenance, support or alimony and that, therefore, the Court had no jurisdiction to order him to pay \$130.00 per month nor any jurisdiction to hold him guilty of contempt of Court for his refusal to pay that amount. The Supreme Court affirmed the contempt order. It said that the question to be decided was whether the provisions in the decree for the payment of \$130.00 per month to his former wife was merely part of an agreement between the parties under which only the usual contract remedies are available, or as to whether such provision is a part of the Court's decree and as such an order for payment of support, maintenance or alimony which may be enforced in contempt proceedings. The Court held that a husband and wife may contract with one another concerning matters of property and support. Such agreements are subject to close scrutiny by a Court in a subsequent divorce action and may be approved, modified or rejected by such Court in the exercise of the powers given to the Court. The Court further held that if the settlement agreement

is complete in itself and is merely referred to in a divorce decree, or approved by the Court, but not actually made a part of the decree, then the provisions of the agreement cannot be enforced by contempt proceedings. On the other hand, if by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree, that if the agreement is actually incorporated in the decree, then such provisions become a part of the order of the Court and may be enforced as such. The Court then holds that an examination of the agreement in question and of the decree clearly shows that both the parties and the trial Court intended the monthly payments to be made a part of the divorce decree and that such monthly payments were intended to be made for the support of the wife and that the provision in the decree declaring that the plaintiff is not entitled to maintenance, support or alimony is reasonably to be construed to mean that the wife is not entitled to maintenance, support or alimony other than as theretofore agreed upon by the parties as approved and adopted by the Court. All of the observations of the Court in that case are equally applicable under the facts of this case.

The case of *Solomon v. Solomon* was decided by the Supreme Court of the State of Florida in 1941 and is found at 5 So. (2d) 265. In that case the husband and wife had entered into an agreement providing that the husband would pay taxes and insurance upon the home of the wife and that the husband would pay to the wife the sum of \$300.00 per month. The divorce decree made no express payment of any stipulated sums

of money but provided "that the property settlement and agreement . . . is hereby approved and ratified in all respects and incorporated by reference into this decree and made a part thereof." The Court held that such provision was clearly sanctioned by the divorce Court in its decree and was incorporated therein by reference sufficiently so that the divorced husband was under order by the Court to make such payment, and, therefore, such provision of the divorce decree was enforceable by contempt proceedings, even though the divorce decree contained no specific order commanding the divorced husband to make the payment.

See also *Miller v. Superior Court* (California) 72 Pac. (2d) 868, *Sessions v. Sessions* (Minnesota) 226 N.W. 211, *Ex parte Weiler* (California) 289 Pac. 645, *Sullivan v. Superior Court* (California) 237 Pac. 782.

In this matter the defendant admittedly consented that the agreement should be made a part of the decree. For a period of three years after the entry of the decree he made no contention that violation of the decree could not be punished by contempt proceedings. In those respects this case resembles the case of *Dean v. Dean* decided by the Supreme Court of the State of Oregon in the year 1931 and found at 300 Pac. 1027, 86 A.L.R. 79. In that case the wife commenced an action for divorce. The husband was served with process. He appeared and stated in open Court that he did not desire to plead to the complaint or to appear further in the suit. Default was entered and decree rendered in favor of the wife. The decree referred to the agreement made between the parties in settlement of their property rights. The agreement in question was to

the effect that the husband would convey to the wife, free of all encumbrances, a certain dwelling house and would pay to her as alimony \$200.00 per month. The Court decreed that each of the parties should perform the terms of the agreement. The husband made the required payments for a period of four years and then ceased to make the payments and moved to set aside and vacate all of the decree except that part granting a divorce to the plaintiff. The plaintiff in turn had the defendant cited for contempt of Court for his failure to make the payments. The defendant husband was convicted of contempt and an order was entered directing him to pay the moneys into Court or be imprisoned until compliance with the order. The husband appealed from this order. The Court held that the defendant was not entitled to modification by reason of the fact that he had consented to the entry of the decree in question and that he had acquiesced in the provisions of decree for a long period of time and that under a valid, executed contract entered into between plaintiff and defendant prior to the decree, the terms of which were incorporated in the decree, the plaintiff had released her rights and interest in defendant's property in consideration of which another property was conveyed to her and stated that if the husband's motion could be sustained that her right and title to the property would become questionable. The Court ruled that the defendant having obtained a release from the plaintiff of any claims upon her part of the property owned by him has obtained the fruits of his contract and of the decree and for that reason he is estopped to deny

the validity of either. As to the contempt proceeding the Court said that the only ground urged by the husband for reversal of the contempt order was that the unpaid sums are a mere debt for which the defendant cannot be imprisoned for failing to pay because such imprisonment would be in violation of the Oregon Constitution. The Court held that the only question raised on the appeal as to the contempt is the question of whether the Court had jurisdiction to enforce payment of the sums awarded by the decree by an order committing the defendant to prison for contempt of Court. The holding was that the decree was for alimony and does not constitute a debt within the meaning of that term in the constitutional restriction. The contempt order was affirmed.

Appellant in this matter has attacked the validity of the order of the District Court entered November 12, 1954, on the ground that Judge McCarrey, according to the contention of appellant, thought there was something defective in the original decree dated November 30, 1951, and that Judge McCarrey entered an order specifically directing the payment of money to remedy that defect. Appellant further argues that such order would have constituted a modification of the original decree and therefore could not have been effective. In that respect, appellee calls the attention of the Court to the case of *Tripp v. Tripp*, previously cited. In that case, as in this case, the Court ordered the defendant to pay a part only of the amount admittedly due. The Appellate Court found that that order was more favorable to the defendant than he deserved, and that he had no occasion to question the

order. It should be noted that Judge Dimond in this case had previously ordered defendant to pay a part of the amount admittedly due. Judge McCarrey followed the same procedure. It was obvious in both instances that under the circumstances an order requiring the defendant to pay the entire amount then due under the terms of the decree would be futile.

VI.

CONCLUSION.

In conclusion it appears to appellee that a reading of the record will disclose without any doubt that the appellant in this matter has had and now has nothing but contempt for the District Court for the Territory of Alaska and for its orders. He started out by violating the restraining order *pendente lite*. He followed that by refusing to obey a subpoena issued by the Court. He followed that by voluntarily disposing of all of his property and then refusing to make the payments as ordered by the Court. When cited for contempt he contended that he could not comply with the orders of the Court. When found guilty of contempt he promptly complied with the orders and made the necessary payment. He followed with a voluntary bankruptcy petition and claimed that adjudication in bankruptcy released him from his duty to comply with the Court order. Finally, after everything else had failed, he claimed that the Court was without jurisdiction to deal with him for contempt. Failing in that in the District Court he refused to comply with the order of such Court re-

quiring him to pay toward the satisfaction of the mortgage against plaintiff's home and took this appeal. Appellee thinks that it is reasonable to speculate that appellant has expended more in prosecuting this appeal than he would have been required to pay in complying with the order of the Court. Appellee also points out that appellant secured and filed a supersedeas bond in this matter. What security, if any, appellant furnished to the bondsman is not known to appellee. However, it is apparent that in the event that the order of the District Court is affirmed, that the moneys due on the mortgage to the date of the order of the lower Court can be paid.

Appellee believes that it has amply been demonstrated that the District Court had jurisdiction to deal with the defendant for contempt and prays that the order of the District Court may be affirmed by his Court.

Dated, Anchorage, Alaska,

March 20, 1956.

Respectfully submitted,

DAVIS, RENTFREW & HUGHES,

By EDWARD V. DAVIS,

Attorneys for Appellee.

(Appendix Follows.)



Appendix.



Appendix

*1

“* * * If, however, the court determines that either party, or both, is entitled to a divorce an interlocutory order must be ordered accordingly, declaring that the party in whose favor the court decides is entitled to a decree of divorce as hereinafter provided; which order shall also make all necessary provisions as to alimony, costs, care, custody, support and education of children and custody, management and division of property, which order as to the custody, management and division of property shall be final and conclusive upon the parties subject only to the right of appeal; but in no case shall such interlocutory order be considered or construed to have the effect of dissolving the marriage of the parties to the action, or of granting a divorce, until final judgment is entered: Provided, that the court shall, at all times, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice. Appeals may be taken from such interlocutory order within ninety days after its entry. (L '21, p. 332, section 2. Cf. L '54, p. 406, section 7; Cd. '81, section 2006; L '91, page 43, section 4; 2 H.C. section 770).”

*2

“For the division between the parties of their joint property, or the separate property of each, in such manner as may be just, and without regard as to

which of the parties is the owner of such property; and to accomplish this end the judgment may require one of the parties to assign, deliver or convey any of his or her real or personal property to the other party; and the provisions of section 55-10-6 of the Compiled Laws of Alaska 1949 shall apply to any such judgment.”

No. 14758

United States
Court of Appeals
for the Ninth Circuit

RICHARD T. HAWLEY, Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a corpora-
tion, Appellee.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK



No. 14758

United States
Court of Appeals
for the Ninth Circuit

RICHARD T. HAWLEY,

Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Joseph S. Kane in Support of	
Judgment Nunc Pro Tunc	35
Answer to Complaint	7
Appeal:	
Certificates of Clerk to Transcript of Record	
on	40, 42
Cost Bond on	32
Notice of	31
Order Extending Time to Docket Record on	34
Statement of Points on (USCA).....	235
Stipulation Extending Time to File Record	
on	33
Certificate of Clerk to Transcript of Record..	40
Supplemental	42
Complaint	3
Cost Bond on Appeal	32
Instructions to the Jury Proposed by Plaintiff	14
Judgment and Order of Dismissal Nunc Pro	
Tunc	37

Marshal's Return on Subpoena—Jeanette Miller	24
Motion of Plaintiff for New Trial.....	25
Affidavit of Joseph S. Kane.....	26
Names and Addresses of Attorneys.....	1
Note for Motion Docket.....	28
Notice of Appeal	31
Order Authorizing Release of Exhibits filed May 11, 1955	39
Order Denying Motion for New Trial.....	30
Order Extending Time to Docket Record on Appeal	34
Order for Removal of Exhibits filed Jan. 31, 1955	29
Pretrial Order	9
Request for Subpoena, Jeanette Miller.....	13
Subpoena with Marshal's Return, Joseph S. Kane, Attorney	6
Statement of Points on Appeal (USCA).....	235
Stipulation Extending Time to File Record on Appeal	33
Stipulation for Entry of Judgment Nunc Pro Tunc	36
Stipulation Order Removing Exhibits filed Jan. 31, 1955	30
Stipulation for Release of Exhibits filed May 11, 1955	38

Transcript of Portions of Proceedings and	
Testimony	78
Motion to Dismiss by Defendant at Close of	
Plaintiff's Testimony	219
Granted	233
Opening Statement by Mr. Kane.....	81
Opening Statement by Mr. Holland.....	85
Witnesses:	
Hawley, Richard T.	
—Deposition	43
—direct	88
—cross	133
—redirect	167
Leibly, Frank J.	
—direct	202
—cross	206
—redirect	211
—recross	212
—recalled, recross	217
Meyers, Clarence H. (Deposition)	
—direct	169
—cross	179
Perry, Raymond Joseph (Deposition)	
—direct	185
—cross	193
—redirect	199
—recross	200
Roe, Carol	
—direct	213



NAMES AND ADDRESSES OF ATTORNEYS

KANE and SPELLMAN,

1001 Smith Tower,
Seattle 4, Washington,

Attorneys for Appellant.

BOGLE, BOGLE & GATES, and
ROBERT V. HOLLAND,

642 Central Building,
Seattle 4, Washington,

Attorneys for Appellee.



In the District Court of the United States, Western
District of Washington, Northern Division

No. 3621—In Law

RICHARD T. HAWLEY, Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a corpora-
tion, Defendant.

COMPLAINT

Plaintiff elects to have the above entitled cause
tried by a jury and hereby demands a jury.

Action Under Special Rule for Seaman to Sue
Without Security and Prepayment of Fees. (28
U.S.C. No. 1916)

Plaintiff, by his attorney, Joseph S. Kane, com-
plaining of the defendant, respectfully alleges:

I.

Upon information and belief that at all times
hereinafter mentioned the defendant, Alaska Steam-
ship Company, was and now is a domestic corpora-
tion existing under and by virtue of the laws of
Washington doing business as a shipowner and op-
erator of ships in the Western District of Wash-
ington, Northern Division.

II.

Upon information and belief, that at all times
hereinafter mentioned defendant chartered or op-

erated and acted as general agent for a steamship known as the M. V. Square Sinnet, operated said vessel, and was in possession and control thereof.

III.

That at all times hereinafter mentioned plaintiff was employed as wiper on said vessel by the defendant, specifically on August 21, 1953.

IV.

Said vessel was and is an American Vessel and plaintiff became a member of the crew of said vessel as aforesaid.

V.

That on or about August 21, 1953 about 8:30 a.m. plaintiff was engaged in the course of his duties in loading cargo in the lower part of number 1 hole. While plaintiff was thus engaged, through the negligence of the defendants, its agents, servants and employees, a pallet board was pushed into the pit of plaintiff's stomach pinning him between the pallet board and cases of cans. Plaintiff received a wound in the umbilical region requiring hospitalization and treatment for infection.

VI.

Injury was caused by the negligence, carelessness and recklessness of the defendant, its agents, servants and employees in swinging the pallet board so that it would strike the plaintiff while plaintiff was standing in an area from which he could not escape the impact.

VII.

That due to the injury sustained plaintiff has been unable to pursue his ordinary occupation as a seaman and has endured great pain and suffering. Plaintiff has been forced and will be forced in the future to sustain considerable expense for medical treatment and for his maintenance.

VIII.

That as a direct and proximate result of the carelessness and negligence of the defendant as aforesaid, plaintiff sustained such injuries to his person, and such injuries were directly caused by reason of the negligence of the defendant, its agents, servants, employees in that: they failed and neglected to supply the plaintiff with a safe place to work; failed to supply the plaintiff with a sufficient number of co-employees and superior officers; failed to properly instruct plaintiff in the course of his duties; failed to properly superintend and supervise the work going on at the time the plaintiff was injured; failed to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn the plaintiff of impending danger.

IX.

Said injuries were not caused or contributed to by any fault or want of care on the part of the plaintiff.

X.

That as a result of said injuries plaintiff has suffered extreme pain in the past, will suffer such

pain in the future and has lost wages which he otherwise would have earned, to his total damage in the sum of \$20,000.00.

Wherefore, plaintiff prays judgment against the defendant:

(a) For personal injuries in the sum of \$20,000.00.

(b) For his costs and disbursements incurred by this action.

(c) For such other and further relief as the Court may deem just and proper.

/s/ JOSEPH S. KANE,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed January 4, 1954.

[Title of District Court and Cause.]

SUMMONS WITH COMPLAINT

To the above named Defendant:

You are hereby summoned and required to serve upon Joseph S. Kane, plaintiff's attorney, whose address is 1001 Smith Tower, Seattle 4, Wn., an answer to the complaint which herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken

against you for the relief demanded in the complaint.

Date: January 4, 1954.

[Seal] MILLARD P. THOMAS,
 Clerk of Court
 /s/ J. THORNBURGH,
 Deputy Clerk

Return of Service of Writ attached.

[Endorsed]: Filed January 14, 1954.

[Title of District Court and Cause.]

ANSWER

Comes Now Alaska Steamship Company, defendant herein and for answer to the complaint of the plaintiff on file herein admits, denies and alleges as follows:

I.

Answering Paragraph I, defendant admits the same.

II.

Answering Paragraph II, defendant admits the same.

III.

Answering Paragraph III, defendant admits the same.

IV.

Answering Paragraph IV, defendant admits the same.

V.

Answering Paragraph V, defendant denies the same.

VI.

Answering Paragraph VI, defendant denies the same.

VII.

Answering Paragraph VII, defendant denies the same.

VIII.

Answering Paragraph VIII, defendant denies the same.

IX.

Answering Paragraph IX, defendant denies the same.

X.

Answering Paragraph X, defendant denies the same

Further Answering the complaint of the plaintiff and by way of a First Affirmative Defense thereto, defendant alleges that if the plaintiff has been injured and/or damaged as in his complaint alleged, or at all, said injuries and/or damages were proximately caused by and contributed to by the negligence of the plaintiff in that he placed himself in a position of obvious peril and failed to withdraw from an area of hazard when he saw or in the exercise of ordinary care and caution should have seen that the pallet board was swinging in his direction.

Wherefore having fully answered the complaint of the plaintiff, defendant prays that it may be

dismissed and recover its costs and disbursements herein to be taxed.

/s/ BOGLE, BOGLE & GATES,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed January 22, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had, whereat the plaintiff was represented by his attorneys, Kane & Spellman, and the defendant represented by its attorneys, Bogle, Bogle & Gates, the following issues of fact and law were framed and exhibits identified:

Admitted Facts.

1. That at all times hereinafter mentioned the defendant Alaska Steamship Company was and now is a domestic corporation existing under and by virtue of the laws of Washington doing business as a shipowner and operator of ships in the Western District of Washington, Northern Division.

2. That at all times hereinafter mentioned defendant chartered or operated and acted as general agent for a steamship known as the M. V. Square

Sinnet, operated said vessel and was in possession and control thereof.

3. That at all times hereinafter mentioned plaintiff was employed as wiper on said vessel by the defendant, specifically on August 21, 1953.

4. That said vessel was and is an American Vessel and plaintiff became a member of the crew of said vessel as aforesaid.

Plaintiff's Contentions.

1. That on or about August 21, 1953 about 8:30 a.m. plaintiff was engaged in the course of his duties in loading cargo in the lower part of Number 1 hold. While plaintiff was thus engaged, through the negligence of the defendants, its agents, servants and employees, a pallet board was pushed into the pit of plaintiff's stomach pinning him between the pallet board and cases of cans. Plaintiff received a wound in the umbilical region requiring hospitalization and treatment for infection.

2. That injury was caused by the negligence, carelessness and recklessness of the defendant, its agents, servants and employees in swinging the pallet board so that it would strike the plaintiff while plaintiff was standing in an area from which he could not escape the impact.

3. That due to the injury sustained plaintiff has been unable to pursue his ordinary occupation as a seaman and has endured great pain and suffering. Plaintiff has been forced and will be forced in the future to sustain considerable expense for medical treatment and for his maintenance.

4. That as a direct and proximate result of the carelessness and negligence of the defendant as aforesaid, plaintiff sustained such injuries to his person, and such injuries were directly caused by reason of the negligence of the defendant, its agents, servants, employees in that; they failed and neglected to supply the plaintiff with a safe place to work; failed to supply the plaintiff with a sufficient number of co-employees and superior officers; failed to properly instruct plaintiff in the course of his duties; failed to properly superintend and supervise the work going on at the time the plaintiff was injured; failed to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn the plaintiff of impending danger.

5. That said injuries were not caused or contributed to by any fault or want of care on the part of the plaintiff.

6. That as a result of said injuries plaintiff has suffered extreme pain in the past, will suffer such pain in the future and has lost wages which he otherwise would have earned.

Defendant's Contentions

1. That if the plaintiff has been injured and/or damaged as in his complaint alleged, or at all, said injuries and/or damages were proximately caused by and contributed to by the negligence of the plaintiff in that he placed himself in a position of obvious peril and failed to withdraw from an area of hazard when he saw or in the exercise of ordi-

nary care and caution should have seen that the pallet board was swinging in his direction.

Issues of Fact

1. Was the plaintiff involved in an accident on August 21, 1953 aboard the defendant's vessel at about 8:30 a.m. while engaged in the course of his duties in loading cargo in the lower part of No. 1 hold.

2. Was the plaintiff's alleged accident of August 21, 1953 proximately caused by the negligence of the defendant.

3. Was the plaintiff guilty of contributory negligence.

Issues of Law

1. None.

Exhibits

The following exhibit will be produced at the trial by either the plaintiff or the defendant and it is agreed that it will be admitted in evidence following proper authentication by the custodian thereof:

1. All hospital records of the U. S. Public Health Service Hospital at Seattle, Washington referring to any treatment provided to the plaintiff at said hospital.

Action by the Court

1. None.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel herein, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not

be amended except by agreement of the parties to prevent manifest injustice.

Dated at Seattle, Washington this 6th day of January, 1955.

/s/ WILLIAM J. LINDBERG,
U. S. District Judge.

Approved:

/s/ JOSEPH S. KANE,
/s/ JOHN D. SPELLMAN
Of Counsel,
Attorneys for Plaintiff.

/s/ BOGLE, BOGLE & GATES,
Attorneys for Defendant.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

REQUEST FOR ISSUANCE AND
SERVICE OF SUBPOENA

Plaintiff, by his attorneys, Kane & Spellman, hereby requests the Clerk of the U. S. District Court, Western District of Washington to issue a subpoena to Jeanette Miller, medical record librarian, U. S. Public Health Service Hospital, Seattle, Washington requesting her to appear before the Honorable William Lindberg, Judge of the District Court on the 7th day of January, 1955 at 2:00 p.m. and to bring with her the records relating to treat-

ment and diagnosis administered to the plaintiff,
Richard T. Hawley.

/s/ KANE & SPELLMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed January 7, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED INSTRUCTIONS
TO THE JURY

The plaintiff herewith requests that the following instructions be given to the jury.

/s/ JOSEPH S. KANE,
Attorney for Plaintiff.

Instruction No.

The plaintiff brings this action to recover damages for personal injuries which he alleges were sustained as a result of having a pallet board pushed into the pit of his stomach and being pinned between the pallet board and cases of cans as a result of which he suffered a wound in the umbilical region requiring hospitalization and treatment for infection.

Plaintiff alleges and defendant admits that the defendant, Alaska Steamship Company was and now is a domestic corporation existing under and by virtue of the laws of Washington doing business as a shipowner and operator of ships in the

Western District of Washington, Northern Division; that the defendant operated the M. V. Square Sinnet, that at all times pertinent plaintiff was employed as wiper on said vessel by the defendant, specifically on August 21, 1953, and that said vessel was and is an American vessel and plaintiff became a member of the crew of said vessel as aforesaid.

Plaintiff alleges that on or about August 21, 1953 about 8:30 a.m. plaintiff was engaged in the course of his duties in loading cargo into lower part of Number 1 hold. While plaintiff was thus engaged, through the negligence of the defendants, its agents, servants and employees, a pallet board was pushed into the pit of plaintiff's stomach pinning him between the pallet board and cases of cans. Plaintiff received a wound in the umbilical region requiring hospitalization and treatment for infection.

Plaintiff further alleges that injury was caused by the negligence, carelessness and recklessness of the defendant, its agents, servants and employees in swinging the ballet board so that it would strike the plaintiff while plaintiff was standing in an area from which he could not escape the impact.

Plaintiff further alleges that due to the injury sustained him he has been unable to pursue his ordinary occupation as a seaman and has endured great pain and suffering. Plaintiff has been forced and will be forced in the future to sustain considerable expense for medical treatment and for his maintenance.

Plaintiff further alleges that as a direct and proximate result of the carelessness and negligence

of the defendant as aforesaid, plaintiff sustained such injuries to his person, and such injuries were directly caused by reason of the negligence of the defendant, its agents, servants, employees in that; they failed and neglected to supply the plaintiff with a safe place to work; failed to supply the plaintiff with a sufficient number of co-employees and superior officers; failed to properly instruct plaintiff in the course of his duties; failed to properly superintend and supervise the work going on at the time the plaintiff was injured; failed to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn the plaintiff of impending danger.

Plaintiff further alleges that said injuries were not caused or contributed to by any fault or want of care on the part of plaintiff.

Plaintiff further alleges that as a result of said injuries he has suffered extreme pain in the past, will suffer such pain in the future and has lost wages which he otherwise would have earned, all to his damage in the sum of \$20,000.00.

All of the above allegations of the plaintiff are denied by the defendant in its answer. Defendant's denial imposes upon the plaintiff the burden of proving such matters so alleged by a fair preponderance of the evidence.

The defendant also raises an affirmative defense stating that if the plaintiff has been injured and/or damaged as in his complaint alleged, or at all, said injuries and/or damages were proximately caused by and contributed to by the negligence of the

plaintiff in that he placed himself in a position of obvious peril and failed to withdraw from an area of hazard when he saw or in the exercise of ordinary care and caution should have seen that the pallet board was swinging in his direction.

Plaintiff has denied all of the allegations of the defendant's affirmative defense, which denial imposes upon the defendant the burden of proving such matters so alleged by a fair preponderance of evidence.

Instruction No.

The basis of plaintiff's cause of action is negligence. The plaintiff is not entitled to recover merely because there has been an accident, but must prove, by a preponderance of the evidence, that the defendant was negligent in the manner charged, and that defendant's negligence was the proximate cause of such injuries.

The term "proximate cause" means that cause which in a direct, unbroken sequence produces the injury complained of and without which the injury would not have happened.

The term "preponderance of evidence" means the greater weight of evidence. It is that evidence which carries the greater convincing power to your minds, regardless of the number of witnesses who may testify for one side or the other. It is that evidence which fairly turns the scales which were evenly balanced before its introduction.

The term "Burden of proof" means the burden of producing evidence which fairly preponderates over the opposing evidence.

“Negligence” is the failure to exercise reasonable and ordinary care, and by the term “reasonable and ordinary care” is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions. Negligence may consist in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances and conditions. Negligence is never presumed, but must be established by proof the same as any other fact in the case.

“Contributory negligence” is negligence or want of care on the part of a person suffering injury or damage which directly and proximately contributed to cause the injuries complained of. It also may consist in doing some act which a reasonably prudent person would not have done under the same or similar circumstances or conditions, or in failing to do something which a reasonably prudent person would have done under the same or similar circumstances. It likewise is never presumed, but must be established by proof by the party alleging it when, as in this case, it is denied by the other party.

Instruction No.

Section 33 of the Merchant Marine Act of June 5, 1920 commonly called the Jones Act, permits any seaman suffering personal injury in the course of his employment at his election, to maintain an action for damages at law against his employer with a right of trial by jury. In such action, all statutes of the United States modifying or extending the

common law right or remedy in cases of personal injury to railway employees are made applicable.

“Translated into marine language this makes recovery dependent on negligence either by the act of any of the officers, agents or employees of the shipowner or by reason of any defect or insufficiency of the vessel’s appliances, appurtenance and equipment. The practical effect of the incorporation of Section 1 of the Federal Employers’ Liability Act into the maritime law was to abolish the defense of the fellow servant rule and to give the seaman a cause of action based on negligence of a fellow servant resulting in injury, or for injury sustained by reason of any defect or insufficiency in the vessel and her appliances and equipment.

By Section 3 of the Act contributory negligence did not bar recovery as under the common law but the statute applied the admiralty rule of comparative damages and reduced the award in proportion to the degree of the employee’s negligence.

Section 4 of the Act abolished the defense of assumption of risk where the injury was due in whole or in part by the result of the negligence of a fellow-servant or the owner or by the violation of any statute enacted for the safety of the employee.

Instruction No.

Defendant was under a duty to properly superintend and supervise the work plaintiff was doing. If the defendants superior officers in the exercise of such supervision had opportunity to know that plaintiff was working in a dangerous position then

it was the duty of such superior officer or officers to restrain plaintiff from beginning or carrying on such work as long as the danger of this condition persisted, and the failure to do so constituted negligence.

Instruction No.

The obligation on the part of an employer of a seaman to use reasonable care to furnish such seaman with a reasonably safe place to work is not only a positive and continuing duty which exists during all the time of the seaman's service aboard the vessel, but it is also a non-delegable duty, that is, it is a duty which the law does not excuse the employer from fulfilling on the ground that he might have delegated this duty to the captain or the mate or some other employee or person, as it is a direct obligation on the ship-owner employer.

You are instructed that such an obligation to provide a safe place to work carries with it the duty of the defendant to maintain its equipment in a reasonably safe condition and to exercise reasonable care to see that the equipment is free from defects or hazards and properly cared for by the employees of the defendant and that every precaution is taken to safeguard plaintiff and other employees.

If you find that the plaintiff was injured as a direct and proximate result of the failure of the defendant to provide its employees with a safe place to work in a reasonably safe condition and to exercise reasonable care to see that such hold was free from hazards, so that in working in the hold

the plaintiff did not have a safe place to work at the time of the accident, you shall find for the plaintiff.

Instruction No.

You are instructed that the defendant, the Alaska Steamship Company, is a corporation, and that as a corporation it can only act through its officers, agents and employees. If you find that the plaintiff was injured as the proximate result of the negligence, if any, of any of the defendant's employees, or the neglect of duty, if any, of any of its employees, then you shall find for the plaintiff and against the defendant, the Alaska Steamship Co.

Instruction No.

I instruct you that the plaintiff has asked for damages for alleged permanent injuries arising out of the incident or occurrence of which he complains. In this connection, you are instructed that if the evidence merely shows a possibility of such a result from such incident or occurrence herein, then you cannot allow damages for any permanent injuries. Before you may allow damages for an alleged permanent injury, it must first appear by a preponderance of the evidence that such alleged permanent injury is reasonably certain to have resulted from the particular injuries of which the plaintiff complains herein.

Instruction No.

If you find a verdict for the plaintiff, you will assess his damages in such an amount as will fully and fairly compensate him for such personal in-

juries, if any, and for such loss of earnings as he has and will sustain, if any, as a direct and proximate result of defendant's negligence, if any. If you find that the plaintiff suffered plain and disability or physical impairment as a direct and proximate result of defendant's negligence, the damages assessed by you should include such an amount as will fully and fairly compensate him for such pain, suffering, physical disability or impairment, if any.

You are not permitted to indulge in speculation or conjecture, but may award damages only for such matters as are shown to have happened, or as are reasonably certain to happen. You will award no damages for injuries other than those alleged in the complaint and enumerated in these instructions. Such plaintiff, if you find that he is entitled to a verdict upon his first cause of action, can only recover for such injuries, if any, as were proximately caused by the negligence, if any, of the defendant.

The purpose of the law is not to punish the defendant, but to fairly and fully compensate the plaintiff. Under no circumstances shall your verdict as to such personal injuries exceed the sum demanded in the plaintiff's complaint therefor.

The law has not furnished us with any fixed standard by which to measure pain and suffering or the impairment of one's physical vitality, nor by which to measure the compensation to be paid for such things. With reference to these matters you

must be guided by your own experience and judgment based upon the evidence in the case.

Instruction No.

It is the duty of the court to instruct you as to the law governing the case, and you shall take such instructions to be the law. You shall consider the instructions as a whole, and not pick out any particular instruction and place undue emphasis on such instruction.

The court is not permitted to comment on the evidence, and it has not intentionally done so. If it has appeared to you that the court during the trial, or in the giving of these instructions, has commented on the evidence, you shall disregard such comment entirely.

You will also disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the court, and any evidence which after the admission was stricken by the court.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice to

have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice.

Instruction No.

The fact that the court has instructed you upon the rules governing the measure of damages is not to be taken by you as an indication on the part of the court that it believes or does not believe that the plaintiff is or is not entitled to recover damages. Such instructions are given to guide you in arriving at the amount of your verdict only in the event that you find from the evidence and from the instructions given you by the court that the plaintiff is entitled to recover damages. If from the evidence and the instructions given you by the court you find that the plaintiff is not entitled to recover, then you are to disregard entirely the instructions which have been given you concerning the measure of damages.

Acknowledgment of Service.

[Endorsed]: Filed January 7, 1955.

[Title of District Court and Cause.]

* * * * *

MARSHAL'S RETURN ON SERVICE

Received this subpoena at Seattle, Washington, on January 7, 1955, and on January 7, 1955, at Marine Hospital, Seattle, Wash., 10:45 a.m. I served it on the within named Jeanette Miller by delivering a copy to her and tendering to her the

fee for one day's attendance and the mileage allowed by law.

Dated: January 7, 1955.

Service Fees: Travel, \$0.40; Services, \$0.50;
Total, \$0.90.

W. B. PARSONS,
U. S. Marshal
/s/ JOHN E. O'CONNOR,
Deputy U. S. Marshal

[Endorsed]: Filed January 13, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff, Richard T. Hawley, moves that the order and judgment of dismissal in the above-entitled cause be set aside and vacated and that a new trial be granted to the plaintiff for the following reasons:

1. There was not a complete absence of pleading or proof on issues material to the cause of action.
2. There are controverted issues of fact upon which reasonable men could differ.
3. There was sufficient evidence in the form of facts and inferences to be drawn therefrom so that reasonable men could come to a contrary conclusion.

4. The court failed to view the evidence in the light most favorable to the party against whom the motion was made and failed to give him the advantage of every fair and reasonable intendment that the evidence could justify.

/s/ JOSEPH S. KANE,
/s/ JOHN D. SPELLMAN,
Of Counsel,
Attorneys for Plaintiff.

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of Washington,
County of King—ss.

Joseph S. Kane, being first duly sworn on oath deposes and says:

That the defendant's motion for dismissal at the end of plaintiff's case should not have been granted, for the following reasons:

1. That there was sufficient evidence as to negligence on the part of the defendant so that reasonable men could come to contrary conclusions as to liability.

2. That taken in the light most favorable to the plaintiff, as was required when the motion for dismissal was made by the defendant, the facts indicated:

(a) That defendant had created an unsafe condition in the hold where plaintiff was working when injured. The unsafe condition was the sheer drop

off which severely limited the working space in which the men were working and made it hazardous for them to swing the pallet board in the closely confined area. That plaintiff was injured as a direct and proximate result of the said unsafe condition, in that his injury was caused by the fact that the pallet board must necessarily have to be swung in a limited area and that this left no place of safety to which he could retreat and find protection as the board swung toward him.

(b) That defendant negligently failed to supply plaintiff with a sufficient number of competent co-employees to carry out the work going on at the time of his injury. That there was in fact only one member of the deck department present at the time of the injury and that the others present were cannery workers not skilled in cargo stowing and the plaintiff who was a member of the engineering department of the vessel and neither schooled nor having any specialized knowledge of cargo loading procedure. That members of the deck department of the vessel are licensed to handle and stow cargo and should carry out such work. That plaintiff's injury was directly and proximately caused by failure of defendant to supply competent and skilled members of the deck department to load the cargo and swing the cargo board in the manner necessitated by the confined area.

(c) That defendant negligently failed to properly supervise the work going on at the time plaintiff was injured. That no ship's officer or other member of the crew responsible for cargo stowage was

present in or near the said hold directing loading at the time plaintiff was injured. That had such supervision existed, proper safety precautions could have been taken to prevent injury to the plaintiff or others working in the hold; and that plaintiff was directly and proximately injured as a result of defendant's failure to properly supervise the work.

/s/ JOSEPH S. KANE,
Attorney for Plaintiff.

Subscribed and Sworn to before me this 19th day of January, 1955.

[Seal] /s/ JOHN D. SPELLMAN,
Notary Public, in and for the State of Washington,
residing at Bellevue.

Acknowledgment of Service attached.

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

NOTE FOR MOTION DOCKET

To: The Clerk of the Above Entitled Court:

Please note plaintiff's Motion for New Trial on the Motion Docket for Monday, January 31, 1955.

/s/ JOSEPH S. KANE,
Attorney for Plaintiff.

To: Bogle, Bogle & Gates, attorneys for defendant:

Please take Notice that the plaintiff's Motion for New Trial in the above-entitled cause will be

brought on for hearing on Monday, January 31, 1955.

/s/ JOSEPH S. KANE,
Attorney for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

ORDER FOR REMOVAL OF EXHIBITS

Upon stipulation made and entered into by the parties hereto, through their respective and duly authorized attorneys,

It Is ordered that the United States Public Health Service Hospital Records relating to the plaintiff herein be temporarily released and returned when plaintiff has completed his present treatment at said institution.

Done in Open Court this 31st day of January, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved by:

/s/ BOGLE, BOGLE & GATES,
Attorneys for Defendant.

/s/ ROBERT V. HOLLAND

Approved and Presented by:

/s/ JOSEPH S. KANE

Acknowledgment of Service attached.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

STIPULATION FOR ORDER OF REMOVAL

It Is Hereby Stipulated by and between the parties hereto, through their respective and duly authorized attorneys, that the United States Public Health Service Hospital records relating to the plaintiff herein be temporarily released so that they may be used by said hospital in further treatment of plaintiff which is necessary without further delay. Said records are Exhibits 6, 7-12, inclusive, in this cause.

Dated this 28th day of January, 1955.

/s/ JOSEPH S. KANE,

Attorney for Plaintiff.

/s/ BOGLE, BOGLE & GATES,

Attorneys for Defendant.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff's Motion for New Trial having come on regularly for hearing on the 31st day of January, 1955, the plaintiff being represented by Mr. Joseph S. Kane and the defendant being represented by

Robert V. Holland and the court having heard argument of counsel and being fully advised in the premises; now, therefore

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff's motion for new trial be and the same hereby is denied.

Done in Open Court this 9th day of February, 1955.

/s/ WILLIAM J. LINDBERG,
U. S. District Judge.

Presented and approved by:

/s/ ROBERT V. HOLLAND
of Bogle, Bogle & Gates,
Attorneys for Defendant.

Approved:

/s/ JOSEPH S. KANE,
Attorneys for Plaintiff.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Richard T. Hawley, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment of involuntary dismissal entered in this action on January 11, 1955; upon which an

order denying plaintiff's motion for new trial was entered on February 9, 1955.

/s/ KANE & SPELLMAN,
Attorneys for the Appellant,
Richard T. Hawley.

Acknowledgment of Service attached.

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the undersigned, Richard T. Hawley in the above entitled action, as principal and National Surety Corporation, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the Alaska Steamship Co., Corp. for the benefit of whomsoever it may concern in the penal sum of Two Hundred Fifty Dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and the said surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and sealed this 8th day of March, 1955.

Whereas, on the 9th day of February, 1955, the above entitled court rendered and entered a judg-

ment or decree in the above entitled cause in favor of the above named Alaska Steamship Co., Corp. and against the above named principal;

And Whereas, the said appellant feeling aggrieved by said judgment or decree and desiring to appeal from the same to the United States Circuit Court of Appeals, 9th Circuit; and perfect said appeal by this bond.

Now, Therefore, the Condition of the above obligation is such, that if the said appellant will pay all costs and damages that may be awarded against Him on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty (\$250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

[Seal] /s/ RICHARD T. HAWLEY,
NATIONAL SURETY
CORPORATION

/s/ By MILDRED PALITZKE,
Attorney-in-fact

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO FILE RECORD ON APPEAL

It is hereby Stipulated and Agreed that the time of the appellant within which to print, serve and file the record on appeal herein, and to take all steps necessary to the prosecution of the appeal,

and to docket the same, be and the same is hereby extended to and including the 13th day of May, 1955 by reason of the extended length of the record herein and the inability of the court reporter to complete the said record prior to the date prayed because of the necessity for his daily appearance in court.

Dated this 18th day of March, 1955.

/s/ BOGLE, BOGLE & GATES,

Attorney for Appellee

/s/ KANE & SPELLMAN

/s/ JOSEPH S. KANE,

Attorney for Appellant

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

ORDER

Upon reading and filing the annexed stipulation dated the 18th day of March, 1955 it is

Ordered that the time of the appellant to file the record on appeal herein and to take all steps necessary to the prosecution of this appeal, and to docket the same, be and the same is hereby extended to and including the 13th day of May, 1955.

Done in open court this 4th day of April, 1955.

/s/ WILLIAM J. LINDBERG,

Judge.

Presented by:

/s/ JOSEPH S. KANE,
Attorneys for Appellant.

Approved:

/s/ BOGLE, BOGLE & GATES,
ROBERT V. HOLLAND
Attorneys for Appellee.

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Joseph S. Kane, being first duly sworn, on oath, deposes and says: That he is one of the attorneys for plaintiff; that on January 11, 1955 the Court orally granted defendant's motion for dismissal and an entry thereof was made in the docket by the Clerk of the Court; that subsequent thereto, on February 9, 1955, the Court denied plaintiff's motion for a new trial and plaintiff filed notice of appeal; that it now appears that no formal judgment has been entered and that the docket entry of the clerk may be inadequate as a final judgment from which to appeal; consequently, it is imperative that a judgment nunc pro tunc be rendered and entered to correct what might be a premature ap-

peal, through the mutual mistake and inadvertence of all parties.

/s/ JOSEPH S. KANE,

Subscribed and Sworn to before me this 11th day of May, 1955.

[Seal] /s/ JOHN D. SPELLMAN,

Notary Public, in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

STIPULATION

Come now the parties, through their duly authorized attorneys, and stipulate that a judgment and order of dismissal with prejudice be rendered and entered in the above-entitled cause, nunc pro tunc as of the 9th day of February, 1955.

Dated This 11th day of May, 1955.

/s/ JOSEPH S. KANE,

Attorney for Plaintiff.

/s/ BOGLE, BOGLE & GATES,

Attorneys for Defendant.

[Endorsed]: Filed May 11, 1955.

In the United States District Court, Western District of Washington, Northern Division

No. 3621—In Law

RICHARD T. HAWLEY, Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a corporation, Defendant.

JUDGMENT AND ORDER OF DISMISSAL

This cause having come on for hearing on the 7th day of January, 1955, before the court and a jury; and at the end of plaintiff's case, defendant having moved for a judgment of involuntary dismissal for insufficiency of evidence to prove the cause of action, the court having heard the argument of counsel and being fully advised in the premises; now therefore

It Is Ordered, Adjudged and Decreed that defendant's motion for a judgment voluntary dismissal is granted and the cause of action be and hereby is dismissed with prejudice.

It Is Further Ordered that this order and judgment be entered nunc pro tunc to appear of record as of the 9th day of February, 1955.

Done in Open Court this 11th day of May, 1955.

/s/ WILLIAM J. LINDBERG,
U. S. District Judge.

Presented by:

/s/ JOSEPH S. KANE,

Approved by:

/s/ BOGLE, BOGLE & GATES

[Endorsed]: Judgment entered May 11, 1955;
nunc pro tunc February 9, 1955.

[Title of District Court and Cause.]

STIPULATION FOR RELEASE OF EXHIBITS

Comes Now the parties above named through their attorneys and stipulate that the following numbered plaintiff's exhibits in this cause be sent up as part of the record in appeal herein:

Plaintiff's Exhibit No. 1. Drawing of the No. 1 hold on easel.

Plaintiff's Exhibit No. 2. Sketch of No. 1 hold made by plaintiff.

Plaintiff's Exhibit No. 5. Diagram of ship's hold.

Dated this 11th day of May, 1955.

/s/ JOSEPH S. KANE,

Attorneys for Plaintiff.

/s/ BOGLE, BOGLE & GATES,

Attorneys for Defendant.

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

ORDER AUTHORIZING RELEASE OF
EXHIBITS

Upon stipulation made and entered into by the parties hereto, through their respective and duly authorized attorneys,

It Is Ordered that the Clerk of this court transmit exhibits number one, two and five filed herein as part of the record on appeal in this case.

Done in Open Court this 11th day of May, 1955.

/s/ WILLIAM J. LINDBERG,
U. S. District Judge.

Presented by:

/s/ JOSEPH S. KANE,
Attorney for Plaintiff.

Approved by:

/s/ BOGLE, BOGLE & GATES
/s/ ROBERT V. HOLLAND
Attorneys for Defendant.

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith, as the record on appeal herein, all of the original documents in the file dealing with the action, which said appeal is being taken from the final judgment of involuntary dismissal entered January 11, 1955, upon which an order denying plaintiff's motion for new trial was filed February 9, 1955. The documents transmitted are identified as follows:

1. Complaint, filed January 4, 1954.
2. Subpoena with Marshal's Return thereon, filed 1-14-54.
3. Answer, filed January 22, 1954.
4. Deposition of Richard T. Hawley, filed 2-9-54.
5. Deposition of Clarence H. Meyers, filed 4-14-54.
6. Deposition of Raymond Joseph Perry, filed 1-5-55.
7. Pretrial Order, filed 1-6-55.
8. Request for Subpoena, Jeanette Miller, filed 1-7-55.

9. Plaintiff's Proposed Instructions to Jury, filed 1-7-55.

10. Marshal's Return on subpoena, Miller, filed 1-13-55.

11. Motion Plaintiff for New Trial, filed 1-21-55.

12. Note for Motion Docket, filed 1-26-55.

13. Order for Removal of Exhibits, filed 1-31-55.

14. Stipulation for Order removing exhibits, filed 1-31-55.

15. Order Denying Plaintiff's Motion for New Trial, filed 2-9-55.

16. Notice of Appeal, filed 3-4-55.

17. Cost bond on Appeal, filed 3-8-55.

18. Stipulation Extending Time to File Record on Appeal, filed April 4, 1955.

19. Order extending time to docket record on appeal to May 13, 1955, filed April 4, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me on behalf of the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 7th day of May, 1955.

[Seal]

MILLARD P. THOMAS,

Clerk,

/s/ By TRUMAN EGGER,

Chief Deputy.

[Title of District Court and Cause.]

SECOND SUPPLEMENTAL CERTIFICATE
OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to the record on appeal herein, the following original documents, to wit:

20. Court Reporter's Transcript of Portion of Proceedings of January 7, 1955, filed May 10, 1955.

21. Court Reporter's Transcript of Portion of Proceedings of January 11, 1955, filed May 10, 1955.

22. Affidavit of Joseph S. Kane, filed May 11, 1955.

23. Stipulation for entry of judgment nunc pro tunc February 9, 1955, filed May 11, 1955.

24. Judgment and Order of Dismissal filed May 11, 1955 nunc pro tunc February 9, 1955.

25. Stipulation transmitting exhibits of plaintiff, numbered 1, 2 and 5, filed May 11, 1955.

26. Order Authorizing Transmittal of Plaintiff's exhibits numbered 1, 2 and 5, filed May 11, 1955.

Plaintiff's Exhibits numbered 1, 2, and 5.

In Witness Whereof I have hereunto set my hand

and affixed the official seal of said District Court at Seattle this 11th day of May, 1955.

[Seal] MILLARD P. THOMAS,
 Clerk,
/s/ By TRUMAN EGGER,
 Chief Deputy.

[Title of District Court and Cause.]

DEPOSITION OF RICHARD T. HAWLEY

1001 Smith Tower, Seattle, Washington, January 27th, 1954.

Appearances: Howard P. Staley, 1001 Smith Tower, Seattle, Washington, for the Plaintiff. Edward S. Franklin, of Messrs. Bogle, Bogle & Gates, 603 Central Building, Seattle, Washington, for the defendant.

Deposition upon oral examination before trial of Richard T. Hawley, taken at the instance of the defendant in the above entitled cause, pending in the District Court of the United States for the Western District of Washington, Northern Division, pursuant to oral agreement of counsel for the respective parties, before H. W. Boylan, a notary public in and for the State of Washington, at 1001 Smith Tower, Seattle, Washington, on the 27th day of January, 1954.

It was stipulated by and between counsel for the respective parties that the deposition is being taken at the instance of the defendant for the pur-

pose of discovery in accordance with the rules of the above entitled court.

It was further stipulated by and between counsel for the respective parties that all objections except as to the form of questions or the responsiveness of the answers thereto are reserved until the time of trial.

RICHARD T. HAWLEY

being first duly sworn in the above cause, testified on his oath as follows:

Q. (By Mr. Franklin): What is your name, please? A. Richard T. Hawley.

Q. How old are you, Mr. Hawley?

A. 49.

Q. Are you single or married?

A. Single.

Q. Where do you live, sir?

A. 912 First Avenue.

Q. How long have you been going to sea?

A. 30 years.

Q. How long have you been sailing out of Seattle?

A. Oh, about 13 months now, this last time.

Q. In the Alaska service? A. Yes, sir.

Q. Did you ever have any injuries before the one you claim occurred on the Square Knot?

A. Previous injuries, you mean?

Q. Yes.

A. I was injured on one of the American Mail ships in 1946 and in 1937 I had my leg injured in an American-Hawaiian ship.

(Deposition of Richard T. Hawley.)

Q. Those are the only two injuries you recall of any consequence? A. Yes, sir.

Q. Was it a double hernia on the American Mail? A. No, single hernia.

Q. Right or left side?

A. On the left side.

Q. You recovered from that entirely, did you, Mr. Hawley? A. Yes, sir.

Q. Did you have any post-operative infections or trouble with it? A. No, none at all.

Q. Where were you operated for that?

A. In the Marine Hospital here in Seattle.

Q. Then with reference to your injury on the American-Hawaiian steamship, which leg was that?

A. That was the left leg.

Q. Above or below the knee?

A. Below the knee.

Q. Above the ankle? A. Yes, sir.

Q. About the middle of the leg?

A. Yes, sir.

Q. Were both bones broken or just one?

A. No, no bones were broken at all. I skinned my leg and later it got infected and I had to go to the hospital and they put hot packs on it and I was in there a little over a month and they drained it out.

Q. Just a skin infection? A. Yes, sir.

Q. Mr. Hawley, I notice you had some injury to your left index finger?

A. Yes, that happened years ago when I was a young fellow. I worked in a machine shop.

(Deposition of Richard T. Hawley.)

Q. The end joint was removed?

A. Yes, removed.

Q. Mr. Hawley, what were your earnings, what earnings did you report to the Federal Government for the year 1952? A. For 1952?

Q. Yes. A. 4,000—close to \$5,000.

Q. \$5,000, and then what did you earn for 1953 up to the time of your injury?

A. I haven't earned anything—for 1952?

Q. No, for 1953—that is the year we are just through. A. Around \$4,000.

Q. \$4,000 up to the time of your injury?

A. Yes.

Q. When did you join the Square Knot, roughly?

A. I have it right here——

Q. About July 30th, was it?

A. July 30th.

Q. What did you join her as?

A. Wiper.

Q. And you claim you were injured on August 21, 1953, Mr. Hawley? A. Yes, sir.

Q. Where was the ship?

A. It was in——

Q. Uganik?

A. Some port there at Kodiak Island, I forget—it is a funny name.

Q. Uganik, wasn't it?

A. I guess it was.

Q. What time did your accident happen?

A. 8:30 in the morning.

Q. In what part of the vessel?

(Deposition of Richard T. Hawley.)

A. In No. 1 hold on the forward end.

Q. What were you doing at the time of your accident? A. Stowing cargo.

Q. Loading salmon? A. Yes.

Q. How many men were in No. 1 hatch at the time of your accident?

A. There was ten men below.

Q. Who were they?

A. There was one, the Sailors' delegate, and myself, and three cannery workers on the port side.

Q. Just a moment, what is the name of the Sailors' delegate? A. Perry.

Q. The Sailors' delegate——

A. And myself and three cannery workers on the port side, and on the starboard side there was two sailors and three engine room men—one wiper and two oilers.

Q. On the starboard side there were——

A. Two sailors, two oilers, and one wiper.

Q. Two sailors, two oilers and one wiper?

A. Yes, sir.

Q. Do you know the names of the sailors?

A. There was only one sailor, I know.

Q. What is his name?

A. Meyers. The other fellow I didn't know his name.

Q. Who were the two oilers?

A. Sousa, and the other fellow I can't remember his name—it was a Polish name—and the wiper's name was Olsen.

Q. And you were working on the port side?

(Deposition of Richard T. Hawley.)

A. Yes, sir.

Q. How long had you been working on the port side before your accident?

A. We started at 7:00 o'clock.

Q. Where did your accident occur with reference to No. 1 hatch?

A. I was in the center of the hold right next to the ladder.

Q. Now, the center of the hold next to the ladder on what side?

A. On the port side. We were working port side.

Q. How far forward had cargo been stowed in front of you—right up to the forward bulkhead?

A. No, there was cargo stowed from the ladder to the bulkhead.

Mr. Franklin: Let's mark this sketch Defendant's Exhibit 1, and the other side Defendant's Exhibit B for identification.

Q. Mr. Hawley, would you put a letter "X" where you were standing?

Q. And would you put a circle around it, please? In other words, you were standing——

A. Underneath the hatch coaming.

Q. Underneath the hatch coaming and right near a manhole or a ladder running up?

A. This side of the ladder—we already filled in behind the ladder as on the other sketch there you can see where we filled it.

Q. This Defendant's Exhibit B shows how far you had filled it, doesn't it?

A. Yes, we filled it from here, back here from

(Deposition of Richard T. Hawley.)

the ladder, and we were working out towards the corner of the ship.

Q. Now, would you indicate on Defendant's Exhibit B just where you were standing at the time of your accident? A. Yes.

Q. Well, this area then had not been filled in with cases of salmon where you were standing at the time of your injury?

A. No, it hadn't. We had only filled up to the ladder, then we worked to the side of the ship and brought it back, then after we got the sides filled up then we would fill in the square of the hatch.

Q. Now, how far forward did the tier of salmon run from where you were standing?

A. How far forward?

Q. Yes.

A. There was only three cases between where I was standing and the deep tank.

Q. Three tiers?

A. There was three tiers, yes.

Q. All right, what was the space between the end of the tier and where you were standing?

A. Well, about two cases of salmon.

Q. How wide would that be?

A. Oh, it would be about around close to three feet—under the protection of the hatch coaming.

Q. How far away from the ladder were you?

A. About three feet.

Q. Three feet outboard? A. Yes, sir.

Q. And the area that you were standing in,

(Deposition of Richard T. Hawley.)

there was nothing piled right out to the skin of the ship, was there?

A. No, there wasn't nothing out to the skin of the ship.

Q. Was anybody standing near you at the time of the accident?

A. There was supposed to be another man on the other corner of the board on my side and two men on the outside, and one fellow always watched to see the load was swung in far enough before we gave the winch driver the signal to lower. At the time these three fellows grabbed ahold of the board and swung it the opposite way.

Q. Yes, we will come to that. What kind of winches do they have on the Square Knot?

A. Electric winches.

Q. And you had a hatch tender down below giving signals?

A. No, one man signaled the winch driver after the load was in. There was a hatch tender on the deck.

Q. Well, there was somebody down below in the hold from the port side giving signals?

A. No, nobody giving signals because the man on the deck signaled the load down in the hold, but one of us would stand to signal to drop the load after we swung it under the hatch coaming.

Q. These cases of salmon were on pallet boards?

A. Yes, sir.

Q. And how many tiers would they be on?

A. There was three tiers on them.

(Deposition of Richard T. Hawley.)

Q. About how high?

A. Oh, I would say close to around $3\frac{1}{2}$ or 4 feet.

Q. And the first thing then the winch driver would do, he would lower this pallet board down to the lower hold and stop it, wouldn't he?

A. He would stop it about three feet off the floor.

Q. All right. What was the next procedure?

A. Was to swing the load so that the pallet board would come down forward and aft and we would swing the board athwartships in order to swing it underneath so we could work off of both sides, the forward end and after end, because they were only using half of the hold for salmon because they had fish meal in the after part of the hold.

Q. So that after the winch driver brings the pallet board to a stop about three feet above the deck, what do you and the rest of the men do?

A. There was four men supposed to be one on each corner and we would swing the board around so we could go to work and swing the long side thwartships so we could unload from each one and we would each unhook our corner.

Q. Then after you moved in the pallet board to the location you wanted it set down, then you would give a signal?

A. The other odd man would give the signal for the winch driver to drop it.

(Deposition of Richard T. Hawley.)

Q. Then you would each take the cases and pile them in?

A. Yes, one man working off of each corner.

Q. And that was the procedure you had followed all morning? A. Yes, sir.

Q. At the time of your accident where were you going to stow this salmon?

A. On the port side in the forward end.

Q. And referring to the load that you claim you were injured on, the first thing the winch driver did was to lower it down, was it?

A. Yes, sir.

Q. And where was it when he lowered it down, was it in the center of the square or forward or where? A. About one-third of the way.

Q. Forward?

A. No, it was on the forward end. They had the booms out so they could get in the forward end.

Q. The booms were trimmed so it would be in the forward end? A. Yes.

Q. All right, how far down did the winch driver drop this load before you swung it?

A. Within three to four feet of the deck.

Q. Now, at that time how far away were you from the load?

A. Oh, I would say about around four to five feet.

Q. Which way was the pallet board facing, fore and aft? A. Fore and aft.

Q. And you wanted to turn it thwartships?

A. Yes, sir.

(Deposition of Richard T. Hawley.)

Q. All right, then did each of the four members of the gang grab an end of the pallet board?

A. Each corner, yes, sir.

Q. And which way were they to turn it?

A. We were turning it crosswise then swinging them in under the hatch coaming.

Q. How far under the hatch coaming were you going to drop this load?

A. Oh, about a foot or two underneath the hatch coaming, as far as the cable would allow it to swing in.

Q. And at that time when each man was on the load were you pushing it forward?

A. We were pushing it thwartships—over towards the ship.

Q. Sort of counter-clockwise?

A. Well, they pushed it counter-clockwise the time I got hit, but we had been pushing it clockwise before. That is the way we had done it.

Q. So we are down to the point where each man is on one of the corners. Then who determined which way it should be pushed?

A. Well, we already had been agreed on the pushing them crosswise on account of the opening in the back of the hold.

Q. Who made that agreement?

A. Well, that is the Sailors' delegate was in charge of that side of the ship where we were unloading.

Q. And he had previously specified how they were to be turned?

A. Yes, sir.

(Deposition of Richard T. Hawley.)

Q. Then on this particular occasion——

A. On account of these three cannery workers were green and had never worked before on a ship and he told them how to load.

Q. Who were on this pallet board at the time that you were hurt, besides yourself?

A. There was Perry, the delegate, and these three cannery workers. I don't know their names.

Q. That would be five people on the load?

A. Well, there were four men—there was five men working on each side.

Q. Well, how many men had ahold of the pallet board at the time it swung and hit you?

A. Well, they were on the other side of the board. I didn't see how many had ahold. One fellow was supposed to be on the same side as me but he didn't come over to that side.

Q. If you had done the normal operation you would have——

A. Had two men on each side.

Q. You would have had two men on each side?

A. Yes, sir.

Q. Why didn't you have two men on each side at this time?

A. They were on the after end of the hold and I thought they were going to swing it clockwise like they always did but they swung it counter-clockwise and that is when it caught me.

Q. If this file here is the pallet board and that wall there is the forward bulkhead, did they swing it so that it turned to the left or to the right?

(Deposition of Richard T. Hawley.)

A. We were swinging it to the right to start with and at the time I got hit they swung it to the left and that is where they pinned me in between the salmon and the pallet board.

Q. Now, at the time you first started to move this, were there four men—were they all on one side except yourself?

A. They were all on one side except myself.

Q. And you were on what corner when you first grabbed ahold of the board?

A. On the inboard corner.

Q. And the three other men, where were they?

A. They were on the after side of the board.

Q. They would be here (Indicating)?

A. The after side—

Q. Well, fore, aft, inboard, outboard—they would be on the back of it, wouldn't they?

A. Yes, they were on the back.

Q. All right, so that is the way you started off, was it, with you on the inboard corner and the three men on the back of the board?

A. No, it didn't start out that way. We started out, there was two men working on each side of the board.

Q. All right, two men working on each side of the board when you started out, is that right?

A. That is right.

Q. Then which way did the men push the pallet board?

A. We always pushed it clockwise.

Q. Clockwise—that would be then to the right,

(Deposition of Richard T. Hawley.)

wouldn't it, as you faced forward—is that right?

A. Facing aft.

Q. Well, you say, in other words, as you faced aft——

A. We would swing it to the right.

Q. You would swing it to your right and that would swing it outboard then, wouldn't it?

A. No, swing it inboard.

Q. No, if you are forward facing aft your right is out on the skin of the ship and your left is inboard, isn't it? A. Yes.

Q. All right. Now, let's get back to where you started. You say that there were two men on each end of the board and the first thing that you planned to do was to push it, you say now——

A. Clockwise.

Q. Clockwise? A. That is right.

Q. To the right as you face forward?

A. Yes, that is the way the board was facing.

Q. Well, first it was facing fore and aft?

A. Yes.

Q. Then you say you and the two men pushed it clockwise, which would be to your right as you face forward, is that right? A. Yes.

Q. All right, then it was still three feet above the deck?

A. Above the floor where we were working.

Q. Then what happened next? Was there any change in the position of these men?

A. In what way do you mean?

(Deposition of Richard T. Hawley.)

Q. Well, you say when you first started in there were two men on each side of the board.

A. You see, when we started in we brought up two tiers, what they call two tiers. One tier is four cases of salmon, and the second tier, then we fill in the center, then we make a flooring for the next tier and going up on this next tier there wasn't room enough. In order to land the pallet board to work off of, we had to pack the cases and stack them seven high and we filled in on the forward end of the hold and started across to the side of the ship—start in the center and work out.

Q. Would you put the letter "P" where you had planned to put this pallet board down?

A. Yes.

Mr. Franklin: I see. Off the record.

(Discussion off the record.)

Q. Mr. Hawley, now you have illustrated that what you had planned to do was when this pallet board was landed in a fore and aft direction in the square, you would then give it a quarter-turn—

A. And then swing it in.

Q. And then swing it outboard in the direction of the skin of the ship and then have the winch driver drop it there? A. Yes, sir.

Q. All right. When you started in to make this movement there were two men on each end, were there?

A. There had been two men working on each end.

(Deposition of Richard T. Hawley.)

Q. Yes, then you started to make this quarter-turn? A. Yes.

Q. And what happened after you made the quarter-turn?

A. Then we would swing the board underneath the end of the side of the ship.

Q. And how did you get hurt?

A. When the board came down the three men were on the after side of the board.

Q. When the board came down—you mean when it was first landed?

A. When they brought it down into the hold.

Q. Yes.

A. And I was on the forward end and the fellow that was supposed to be on the corner with me, on account of filling in back of the ladder we were starting out to the side, he moved back underneath and when he came out he got hold of the same side of the board as the others and they swung it counter-clockwise then.

Q. Well, then what happened to you?

A. I was standing back in here and the corner of the board caught me below the belt.

Q. Well, if they were swinging the board out here as you have indicated to land it in "P" how would you be away up there near the manhole?

A. This is the square of the hatch.

Q. Yes.

A. They had the gear trimmed on account of we were only using half of the forward side of the hold, and the gear was trimmed so when they

(Deposition of Richard T. Hawley.)

brought the loads down in they would land right close to the center, and we were turning the board then swinging our loads on our side and the other fellows when they would land would swing them to the starboard side, and when the load came down it just came down on an angle right here and I was standing back in underneath the hatch coaming and when the board came down, they turned the board, the corner hit me in the stomach.

Q. Well, in other words, you had just begun to turn the board around, had you, at the time you were struck? A. Yes, sir.

Q. And you were on the forward end?

A. Forward end.

Q. Forward inboard end of this pallet, were you? A. Yes, sir.

Q. And did you know what the men were going to do, that they were going to swing it or turn it to the outboard side? A. Yes, sir.

Q. And did the board swing or jump in any way? A. No, the board was pushed.

Q. And could the men see you where you were standing?

A. No, the load was high, too high for them to see over.

Q. They couldn't see where you were?

A. No, sir.

Q. Was that the position that they expected you to assume? A. Yes, sir.

Q. And you say that you were pressed—or what part of the pallet board struck you?

(Deposition of Richard T. Hawley.)

A. The forward inboard corner.

Q. That was the corner that you were to grab hold of? A. Yes, sir.

Q. Did it strike you before you grabbed hold of it?

A. No, sir, I had my hand on the line.

Q. What line?

A. From the pallet board to the hook.

Q. What were you doing, were you swinging it over with the line?

A. Each one grabbed a corner. There is four lines there. They use a bridle.

Q. Yes, you grabbed a leg of the bridle?

A. Each one was grabbing a corner of the bridle.

Q. So you grabbed the leg of the bridle and as you were facing aft you were going to swing it out to the port side?

A. No, I was going to swing it in to inboard, to swing it clockwise.

Q. And you claim that these men didn't follow the procedure and swung it counter-clockwise?

A. Counter-clockwise.

Q. And what were you pinned between?

A. I was pinned between the pallet board and the cases of salmon we loaded on the forward end of the hold.

Q. What part of your body was pinned?

A. It didn't pin me in—it just hit me below the belt.

Q. Sort of a glancing blow?

(Deposition of Richard T. Hawley.)

A. A pushing blow. It knocked me back against the cases of salmon.

Q. How far back did it knock you?

A. About two feet.

Q. And where were you struck with reference to your belly button?

A. Below the belly button.

Q. How far below?

A. Oh, I would say about three or four inches below.

Q. Was the board being moved rapidly or slowly at the time it struck you, was it being turned slowly or quickly?

A. Well, it was just a sharp turn, is all.

Q. What would you estimate the weight of that pallet board to be? A. About a ton.

Q. That is with the loads on it?

A. Yes, sir.

Q. Then did it cause you to release your grip on the bridle?

A. It made me release my grip on the bridle and when I fell back against the cases of salmon I grabbed for the ladder and got as close to the ladder as I could. I almost went down but caught myself on the edge of the ladder and held on.

Q. How big an area was it that struck you—just the wooden edge of the pallet board?

A. Steel corner with a round eye in it that the hooks fit into.

Q. What happened after you were knocked back against the ladder?

(Deposition of Richard T. Hawley.)

A. I went to work and told the other fellows to hold it a minute and they held onto the board.

Q. Had any of them seen your accident?

A. Not on their side of the hold.

Q. Do you know if anybody saw you get hit?

A. Yes, the next morning after the day I got hurt I didn't know anybody seen it at the time, but the next morning I was sitting in the mess room and one of the sailors on the other side of the hold come in the mess room at coffee time and asked how I felt and said, "It is a wonder that board didn't knock you cold."

Q. Who was he?

A. Meyers. He asked me how I felt at that time. I was waiting for the third mate to get medical treatment at the time.

Q. After this happened and you called for them to stop, how long did they stop?

A. They just waited until I got out from behind the board, then we swung it in towards the side of the ship.

Q. And continued with your work?

A. Yes, sir.

Q. Did you report the injury to any of the men——

A. At the time——

Q. Excuse me—did you report your injury to any of the men who were working with you at the time it occurred?

A. I reported it to the delegate. I told him at the time when I got hit.

Q. You told Sousa?

(Deposition of Richard T. Hawley.)

A. No, not Sousa—Perry.

Q. You told Perry? A. Yes.

Q. When did you tell him?

A. Right after we landed the load.

Q. He was over on the other side, wasn't he?

A. Yes, he was one of the men working on the board with me.

Q. What did you tell him?

A. I told him from now on to watch it—"I got hit in the stomach that time with the load," and then I said, "It kind of knocked the wind out of me," and that is all it did at the time.

Q. Then how much longer did you work that morning?

A. We worked until 9:00 o'clock and knocked off for coffee and came back after coffee time and about a quarter to 12:00 my stomach started to pain and I couldn't lift one of the cases of salmon up. It was like a strain there.

Q. Now, this was overtime work you were doing, wasn't it? A. Yes, sir.

Q. I mean this work isn't required of a black gang man?

A. It is in the way—it is a company ruling that any of the wipers or day men instead of working down in the engine room that they go to work in the hold during the daytime, during the cargo work, and they will be released from the engine room in order to work cargo to give the sailors a hand as per agreement of the Firemen's union.

(Deposition of Richard T. Hawley.)

Q. But if you don't want to do stevedoring you don't have to?

A. You don't have to, but they expect you to according to the agreement.

Q. Well, then you felt all right, did you, until about a quarter to 12:00 that morning when your stomach started to pain?

A. It started to pain then and I told the Sailors' delegate I couldn't take it any longer, that I was going to knock off.

Q. You told Perry you were going to knock off?

A. Yes, sir.

Q. Did you report your accident immediately to the ship's officers?

A. The third mate at the time was sleeping.

Q. I say did you report your accident immediately to any of the ship's officers, the master or mates or the chief engineer?

A. No, not at the time.

Q. When was it you first made any report of your injury to any officer of the Alaska Steamship Company?

A. Around 6:00 o'clock I went up and seen the chief mate.

Q. And what did you tell him?

A. I asked him if the third mate was up and he said no, and he told me to knock on his door. I knocked on the third mate's door and he didn't answer so I went back to the chief mate's room, which was right next door, and told the chief mate I would like to get some liniment or something, I

(Deposition of Richard T. Hawley.)

thought I got a bruise on my stomach, and he said for me to wait until 12:00 o'clock that night until the third mate got up, that the third mate had been working all night.

Q. And this was about——

A. 6:00 o'clock—6:00 p.m.

Q. And did you see the third mate then at midnight?

A. At around 8:30 my stomach started to hurt me and I couldn't lie down on my stomach at the time.

Q. This is in the evening?

A. Yes, so at 9:00 o'clock when the sailors and the engine room gang knocked off for coffee I called our delegate Sousa and had him go and see the captain to see about getting medical treatment then or otherwise I would want to go see a doctor at 8:00 o'clock in the morning.

Q. Had you had your lunch?

A. No, I didn't eat no supper or dinner.

Q. I beg your pardon?

A. I didn't eat no supper or dinner.

Q. You had your lunch at noon?

A. No, I didn't. I went right to bed and slept until 6:00 o'clock.

Q. All right, then what happened?

A. Then Sousa went up to the captain and the chief engineer and the captain and chief engineer came down to the room at 10:00 o'clock.

Q. And what was done for you then?

(Deposition of Richard T. Hawley.)

A. The chief engineer went up to the third mate and got some liniment.

Q. And was there any evidence of injury at this time? A. No, there was no——

Q. No bruise or swelling?

A. No bruise. There was swelling—just a little bit.

Q. How big was the swelling?

A. Oh, it wasn't very much, it just barely showed.

Q. Well, I mean did you call any swelling to the attention of the captain or the chief engineer?

A. I showed it to them at the time.

Q. Was there any comment made by them about swelling?

A. The chief engineer said he would go up and see the third mate and get some liniment.

Q. But I say was any comment made about any swelling? A. No, no comment made at all.

Q. Then when you got this liniment what happened after that?

A. The captain sent for the purser and had the purser come down and take a statement.

Q. Then did you go to bed that night?

A. I went to bed that night. I was in bed at the time.

Q. You were in bed at the time? A. Yes.

Q. Then what happened on the following day or the next day?

A. Well, I got this liniment that I used but it didn't seem to do any good so in the morning about

(Deposition of Richard T. Hawley.)

9:00 o'clock when they were knocked off for coffee I went up and got the third mate and he gave me some camphor liniment to try that on it—he didn't have anything else that he knew of, and he looked in the medical book and couldn't find anything where he could treat it at that time.

Q. What was the appearance of your stomach the next morning?

A. Well, there was a little—there was pus running out of the navel.

Q. Did you ever have any infection down in your navel before? A. No, sir.

Q. What was done then the next day?

A. Well, I used this camphor liniment for a couple of days but it didn't seem to help.

Q. Did the ship leave Uganik?

A. Yes, sir.

Q. And where did it head for?

A. It was heading for Seattle.

Q. Then how many days from the time of your accident until the ship got into Seattle or Bellingham, wherever it went?

A. It came into Seattle, let's see, we arrived in on Saturday night.

Q. About how many days would it be?

A. Oh, six days from the time I got hurt.

Q. In other words, Uganik was your last port?

A. Last port.

Q. And you headed right for Seattle?

A. Yes, sir.

Q. And did you go to work on the way back?

(Deposition of Richard T. Hawley.)

A. On Wednesday I went down in the engine room. I felt a little better so I went down in the engine room and seen the first assistant and told him I would turn to but I wouldn't do no lifting or anything at the time but I would turn to on light work if he wanted. We were doing a lot of repairing of the engine room pumps and I told him I could do that if he wanted me to, but the chief had left orders for me not to turn to until I seen a doctor.

Q. What was the condition of this pus running out of your navel on the trip down?

A. Well, there was just a slow drainage there, just once in a while, and I went in and took a shower about two or three times a day and washed it off and it seemed to clear up for a little while and then started running again.

Q. Did you have any pain?

A. Yes, it was like there was a pressure there.

Q. Was there any swelling?

A. A little bit.

Q. How big—the size of a pea or the size of the head of a pencil or how big was the swelling?

A. Well, it was in an area all around my stomach at the time—like over-eating.

Q. Did you eat all your meals on the way back?

A. No, not all of them. I didn't eat only breakfast, then at nighttime I would have a little lunch.

Q. And when you got down to Seattle you paid off, did you?

A. No, we got in on a Saturday and I reported

(Deposition of Richard T. Hawley.)

in to the Marine Hospital on Monday and the doctor told me to come back and I figured the ship was paying off on Tuesday and I asked him if I could come back a day or so later and he says okay, and he entered me on the 2nd of September to come back, but when I went down to the ship to get my clothes they didn't pay off. The day I entered the hospital was the day the ship paid off.

Q. Do you remember when you entered the hospital? A. September 2.

Q. How many days was that from the time you had arrived in Seattle?

A. That was four days.

Q. And how long were you in the hospital?

A. I was in the hospital a month.

Q. October 20th, it says here.

A. Until October 20th.

Q. And what did they do for you in the hospital?

A. On September 8th they operated on me and cleaned my stomach out. There was some kind of infection in there. They cleaned my stomach out and sewed it up.

Q. Well, did they enter your stomach?

A. Yes, sir.

Q. Cut open your stomach or above on the flesh over your stomach?

A. No, they cut through my navel and on through my stomach. I can show you here.

Q. No, don't bother.

(Deposition of **Richard T. Hawley.**)

A. It was cut from here down to the bottom there (Indicating).

Q. I see. Did they tell you what they did?

A. Well, at the time the doctor said there was some kind of—well, they call them kind of like stones they had to take out. It was filled in around my intestines and it was building up in there.

Q. Well, they took some stones out of your intestines?

A. Well, it was what they call stones. It is like pus sacs, is what it is, their medical terms. They claim that it was all around in my intestines and everything else when they cut it out.

Q. Then you left the hospital on October 20th?

A. At that time the incision was open about three-quarters of an inch and about three inches long and they treated it twice daily to build the scar tissue up around, so on October 7th or 8th they had to undermine the skin and resew it again.

Q. And did you have infection in that wound?

A. Well, they left a hole about around two inches deep for a drainage to come out and the doctor wanted it to heal from the inside out.

Q. Who was the doctor operated you?

A. Dr. Wise and Dr. Inis Ice.

Q. That is a lady?

A. Yes, that is a lady doctor. She only had about eight initials in her whole name—Inis Ice. Her and her husband are in charge of the Public Health in Tacoma now. They have been transferred to Tacoma.

(Deposition of Richard T. Hawley.)

Q. Dr. Wise is still in the hospital, is he?

A. Yes, sir, he has been transferred down to cutting up bones and stuff like that.

Q. Then they discharged you from the hospital—

A. As an out-patient.

Q. On October 20?

A. Yes.

Q. And what has been your condition since that time?

A. At that time I went back for daily treatments up until September the 2nd.

Q. Not September—you mean December?

A. I mean December.

Q. And what happened December 2?

A. I was discharged for three to six months to make a trip and then come back. They left a hernia there at the time. They took a piece out of the lining of my stomach and there was kind of a hernia left there from the operation but they wanted to build up that and Dr. Wise advised me if I could go to work and take a trip and come back within three months it would be better to come back then and they would have more scar tissue to work on at the time, but on September 20th I noticed that there was a swelling in the center and it had started to turn red so I went back to the hospital.

Q. September 20th?

A. I mean December 20th.

Q. And what did they do then?

A. Dr. Walker advised me to have it repaired.

Q. Dr. who?

A. Dr. Walker.

Q. He advised you to have the hernia repaired?

(Deposition of Richard T. Hawley.)

A. Yes.

Q. Did you have it repaired?

A. He told me to come back the day after Christmas and enter the hospital because there was no operations between then—they were filled up until after Christmas. I got operated on December 29th.

Q. And when did they discharge you?

A. January 8th.

Q. And then you were still an out-patient?

A. I was on out-patient until last Friday and I noticed that there was kind of a pus bag in the same area as before so I reported back in last Friday. I went down to see the doctor that operated on me but he was in surgery so another doctor that took Wise's place on the 7th floor, he looked me over and he lanced it.

Q. When was that?

A. He lanced it last Friday.

Q. January——

A. 22nd, he lanced it, so he advised me to go up in the hospital right away and put hot packs on. It isn't an infection—they got some big word for it—it is a light watery drainage, and yesterday morning, I was released yesterday morning, and Dr. Walker lanced it again and told me to come back in a week or so. He said he didn't think the operation for the hernia had come loose below but he wanted to get that drainage out before they would go to work and make sure, so I have to report back

(Deposition of Richard T. Hawley.)

on February 2 to see this Dr. Marks who is in charge.

Q. At the time just before you claim you were struck, Mr. Hawley, you had both hands on the bridle?
A. Yes, sir.

Q. And were you pulling it?

A. I was swinging—going to swing it.

Q. You were going to swing it to your left?

A. Yes, as I was facing aft to my left.

Mr. Franklin: Will you read the last question and answer?

(Last question and answer read by reporter.)

Q. And what did the men do now, so I get it straight?

A. They pushed the board to the right from the other side. I couldn't see them on account of the load was so high.

Q. And as I understand you, at this particular time that your accident happened how were the men distributed?

A. They were back under the hatch coaming towards the skin of the ship. There is a coaming there and it is a custom to stand back under the hatch coaming while a load is coming down in the hold in case anything should come off.

Q. How far had this load been moved forward at the time you were struck?

A. In which way do you mean?

Q. Forward when it first came down and landed it was lying——

(Deposition of Richard T. Hawley.)

A. It was laying within two feet of the hatch coaming at the time.

Q. And at the time the board was landed it was facing in a fore and aft direction about two feet from the forward hatch coaming?

A. Yes, about even with the ladder but about two feet out from the hatch coaming in the square of the hatch.

Q. All right, now, at that time the load was at rest? A. It was just come to a stop.

Q. Come to a stop, and at that time then it was facing fore and aft? A. Yes, sir.

Q. And you grabbed the inboard forward bridle—— A. Yes, sir.

Q. ——and as you were standing there and you figured they were going——

A. To go to the left.

Q. Lower it to your left? A. Yes.

Q. But instead of that——

A. They swung it to the right and caught me.

Q. They swung it to the right?

A. Yes, sir.

Q. Where were these men standing by the pallet board at the time they swung it?

A. On the after side of the pallet board.

Q. On the after side? A. Yes.

Q. So they had just begun to swing it, they hadn't completed the swing?

A. No, it hit me before they could complete the swing.

Q. What is the length of the pallet board?

(Deposition of Richard T. Hawley.)

A. Oh, I would say between five and six feet.

Q. And there were tow tiers of salmon piled on top of it?

A. There was three tiers.

Q. About four feet?

A. Oh, it would be around five feet.

Q. How many cases in a tier, do you think—about five?

A. There is three cases on a tier. It was three high on the pallet board and a case is about 14 to 16 inches.

Q. And the pallet board was about six feet fore and aft, would you say, and about how many feet wide?

A. Oh, around four feet wide, $3\frac{1}{2}$ or four feet.

Q. Was that the usual load that you had handled?

A. Yes, it is our regular standard.

Q. And do you know why the usual practice wasn't followed on swinging it over to your left side?

A. No, I couldn't say on that.

Q. Well, did you ever find out or ask?

A. No, I didn't.

Q. There was nothing wrong with the winches, was there?

A. There was nothing wrong with the winches, no.

Q. You blame your accident then on this sailor and the three cannery tenders?

A. Three cannery workers—inexperienced men.

Q. And the sailor was the deck delegate, was he?

A. Yes, he was experienced in handling salmon before.

(Deposition of Richard T. Hawley.)

Q. And was he giving orders at the time to them? A. Yes, sir.

Q. But he didn't give you any orders?

A. Yes, at the time—that is why we were working under his directions.

Q. Yes, but I say at the time of your accident he didn't tell you you were not swinging it the same way?

A. No, he didn't. You see, they were on the other side of the board.

Q. Now, you say that eventually you were going to land this pallet board, had planned to land it over where you put the letter "P"? A. Yes.

Q. What difference would it have made whether they swung it to the left or right?

A. We had more room to work on account of the cases of salmon being loaded in between the ladder and the forward bulkhead. We swung it out-board where there was more room to swing and give the board a chance to swing under the hatch coaming.

Q. Then you would want to swing the load out-board, wouldn't you, instead of clockwise?

A. No, we swing it clockwise in order to bring it around so the long side of the board would be facing forward and aft.

Mr. Franklin: That is all.

Q. (By Mr. Staley): This hernia you received on a previous ship, was that an inguinal hernia?

A. No.

Q. Or was it in the same portion of the body?

A. No, it was in the lower left hand side and below. At the time it happened I had a cold and I was walking down the ladder and I coughed and it popped out. The company paid me subsistence for 30 days but it was more medical than an injury.

Mr. Staley: That is all.

Mr. Franklin: That is all.

(Deposition concluded.)

Certificate

State of Washington,
County of King—ss.

I, H. W. Boylan, a notary public duly commissioned and qualified in and for the State of Washington, do hereby certify that pursuant to oral agreement of counsel for the respective parties there came before me on the 27th day of January, 1954, at 10:00 o'clock a.m., at 1001 Smith Tower, Seattle, Washington, the following named person, to wit, Richard T. Hawley, who was by me duly sworn to testify the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to typewriting under my supervision; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is

Appearances: Joseph S. Kane, of Kane & Spellman, 1001 Smith Tower, Seattle, Washington, appeared for and on behalf of the Plaintiff; and Robert V. Holland, of Bogle, Bogle and Gates, 603 Central Building, Seattle 4, Washington, appeared for and on behalf of the Plaintiff.

Whereupon, the following proceedings were had, to-wit: [2]

The Clerk: Richard T. Hawley vs. Alaska Steamship Company, a corporation, Cause No. 3621.

The Court: Is the Plaintiff ready?

Mr. Kane: The plaintiff is ready.

The Court: Is the defendant ready?

Mr. Holland: The defendant is ready.

The Court: The Clerk will fill the jury box.

(Whereupon, a Petit Jury was duly selected and sworn to try the within-entitled and numbered cause, and the following proceedings were then had, to-wit:)

The Court: It is now almost 11:00 o'clock. We may as well take the mid-morning recess.

Members of the Jury, before we hear from Counsel in the opening statements, we will take a short recess.

I caution you now, as those who have served before know, that you are to be cautious throughout the trial; do not form any opinion, not to discuss the case in any respect with one another, or with anyone on the outside when excused at noon, or in the evening, and you are not to form or express any opinions or discuss in any way the issues of this

case until it is finally submitted to you. Should there be any newspaper publicity of any kind in this case, you should avoid reading any newspaper accounts, or accounts of similar matters, while you are [3] serving on this jury.

This case, I assume, will not be completed today?

Mr. Holland: I think it may, your Honor.

The Court: It is possible it may?

Mr. Holland: Yes.

Mr. Kane: I think Monday morning, your Honor.

The Court: Well, I was going to say this:

In the event we do not complete it today, it will be continued until Tuesday, because Monday is what we call Motion and Law Day here, and other matters are taken up on that day; so that, if we do not dispose of it today, it will be continued over until Tuesday; but, certainly, if not completed today, it should be completed——

Mr. Kane: (Continuing) Tuesday morning.

The Court: Yes.

We will now take the recess, and the Court will remain in session while you leave, and you are to go up to the Jury room.

(Whereupon, the Jury retired from the courtroom.)

The Court: Anything to take up?

Mr. Holland: No, your Honor.

Mr. Kane: No, your Honor.

The Court: We will recess for fifteen minutes.

(Whereupon, at 11:00 o'clock a.m. a recess was had in the within-entitled and numbered cause until 11:15 o'clock [4] a.m. January 7, 1955, at which time the following proceedings were had, to-wit:)

The Court: You may call the Jury.

(Whereupon, the Jury was returned to the courtroom.)

The Court: You may be seated.

It is stipulated the Jury are present in the courtroom?

Mr. Holland: Beg pardon?

The Court: I just asked the stipulation that the Jury is present?

Mr. Holland: Yes.

Mr. Kane: Yes.

The Court: I don't think it is necessary in a civil case to require the stipulation so that we will pass it.

You may proceed, Mr. Kane.

Mr. Kane: Your Honor?

The Court: Mr. Kane.

Mr. Kane: Ladies and Gentlemen of the Jury:

In this opening statement, I am going to attempt to give you just a short summary of what I intend to prove to you to show that there has been negligence on the part of the Defendant in this action, and the injuries and damages sustained by the Plaintiff, Richard T. Hawley.

Mr. Hawley is a Merchant Seaman. That is, he sails [5] on commercial vessels in the engine department; meaning by that, he works down in the

engine room, wiper, water-tender, and related activities such as that.

On or about August 21, 1953, Mr. Hawley was a member of the crew of the Square Sinnet.

This vessel is operated and maintained by the Alaska Steam.

In the activities when they get into Alaska as quasi-seamen, engineers and longshoremen, Mr. Hawley, as part of his duties, left the engineroom and was engaged in loading cargo, to-wit: cans of salmon in a port in Alaska.

While engaged in this work in one of these isolated ports, we will prove that in order to get this cargo on and stow it the way the company wanted, and to move it as the company wanted, Mr. Hawley, the plaintiff in this action, was placed in a precarious position, and, in carrying on these duties, we will prove that the company failed to have sufficient officers in charge supervising this hold No. 1 in which he was working down in the bottom of the vessel to see that the speed-up lowering of these pallet boards was done in a safe manner.

We will show that there were insufficient numbers of experienced men working along with the plaintiff in this action to insure his safety while he was engaged in this [6] activity.

We will also prove that this is the only way which Mr. Hawley has to compensate him for his injuries and damages.

This is the means by which a Merchant Seaman gets compensated.

We will attempt to prove that at all times he

conducted his activities as an efficient sailor should conduct them. He was placed in a position where he couldn't do anything and he is under quasi-military jurisdiction, and if he is told to do something, he has to do it.

We will prove he can't say "No"; if he is given an order, he must carry it out, and he can take it up later with the Coast Guard or the Union.

We will prove that at all times Hawley, the plaintiff in this action, did just what you or I or anyone else would do, and that there was no such thing as negligence on the part of Hawley.

I also want you to consider all of the evidence in this matter, and listen to the witness and look at the exhibits and evaluate that which you hear.

We feel as though you people are just ordinary people, just like Hawley and myself, and if we hear something, we can come to a conclusion. [7] You will also hear something about the preponderance of the evidence, what has to weigh in favor of the plaintiff or the defendant.

Now, all those terms in the law, even though they sound very fancy, His Honor will explain to you that they are very simple terms when defined and laid out and they are terms that the reasonable man can understand; and you can put yourself in the position of this plaintiff and say to yourself: "What would you expect?"

Now, in this matter here, we are asking for the sum of——

Mr. Holland: (Interposing) Now, if the Court please, in the pre-trial order, there is no mention

of any prayer in the pre-trial order. I don't think it is proper to mention it in the opening statement.

Mr. Kane: Your Honor, it is in the complaint.

Mr. Holland: The pre-trial order takes the place of the complaint.

Mr. Kane: Only as to the facts, your Honor.

The Court: Where it does take the place of the complaint, I don't think the amount is eliminated, is it? You don't take that position, Mr. Holland?

Mr. Holland: Well, I take the only position, Your Honor, that it is not contained in the order, and it isn't proper to mention it in the opening statement. [8]

Mr. Kane: Your Honor, it is our contention that the prayer—any fact in the complaint that is open to dispute—I mean, we don't consider the prayer as being facts. The pre-trial order just attempts to draw together disputed facts, and things which we need to prove.

Mr. Holland: The contentions which are disputed.

The Court: Of course, the maximum amount or amount prayed for would be a matter covered by the Court at the time of instructions. I think it is a matter that has to be taken up.

I think we might except it at this time, and I will take it up with Counsel, Mr. Kane, in the absence of the Jury.

Mr. Kane: All right, Your Honor.

Now, with that information, Ladies and Gentlemen of the Jury, we will call our first witness.

The Court: Do you reserve your statement, or do you wish to make it now?

Mr. Holland: I have a short opening statement.

The Court: All right.

Mr. Holland: If the Court please?

The Court: Mr. Holland.

Mr. Holland: ——and Ladies and Gentlemen:

The Plaintiff's attorney and I, of course, differ not at all on the majority of the facts in this case, so [9] that my opening statement need be only brief.

The facts of employment, and the type of work being done, and the cargo loaded, and the nature and construction of the vessel are things agreed upon.

There is one or two incidents at the time of the injury about which we do disagree.

I would wish to make a brief statement possibly to assist members—any members of the jury who may not have been aboard merchant vessels, or who have not observed cargo operations, to clarify initially, if I can, Ladies and Gentlemen, the construction of the vessel, and what the area is like where this accident happened.

I think the defendant's evidence, if not the plaintiff's itself, will show that the hold of the vessel may be likened to this entire room, a difference in size, generally, of course, but generally a large room like we are in now, and with an opening in the ceiling of the room, roughly, portrayed by the square in the ceiling, which is the opening down through which the cargo comes to the lower deck.

I would be then standing in the hold of the vessel, where Mr. Hawley was standing at the time of his injury the cargo being lowered down by the ship's gear.

I think the evidence will show that while Mr. Hawley [10] wasn't exactly standing on the bottom of the hold itself, that there had been layers of cargo and canned salmon in that hold, so that I might be up three or four feet to represent that, but I would be on a flat surface, much as the floor.

The evidence will show that as he stood in this position, the cargo was lowered down by means of a pallet board, which is a board construction—I think we may have some sketches and pictures of it—something like 4x5 feet, or 4x6 feet, on which the cases of salmon are placed, and the evidence, I believe, will show that something like 35 to 40 cases of this normal standard cardboard size boxes are placed on this pallet board in the one load, and that the total load would be somewhere around 17 or 1500 pounds.

The evidence will show that the board is then lowered down through this opening in the ceiling to the place close to the deck upon which I am standing, upon which Mr. Hawley was standing, and that the men working down below, I think there were about 8 or 10 men working below, and they would then move this about as they could and attempt to move it back towards the wings.

The evidence will show that the wings of the hold itself would represent part of the hold back away, not directly under the opening; if I were

under the opening, [11] I would get wet, but if I would be back in the wing; or aft, if the stern; or forward, if the bow.

The evidence will show that at the time of the accident, the men were there to take this load, as it hung in mid-air to unload, and to save themselves work, that they were just commencing at the time of the accident, they would move this pallet board over closer to where they wanted to unload it, and then they would move it over, and swing it like a pendulum, and when it got as far as they could swing it, why, they would then signal for the driver to drop it, not over here where it would naturally drop, but they might swing it over so far, and then they could unload the cases from here to there, and save a few steps.

The evidence will show that everybody down there had been following this procedure, and everybody, including Mr. Hawley, knew what was going on, and that at the moment of the injury claimed here, they were just turning this board, 4x6, from crosswise to lengthwise, the particular way they wanted to have it, in position, and the evidence will show that Mr. Hawley himself had his hands on the board, or a part of the gear attached to the board, and the other men had their hands on it, and that this heavy, 1500 or 1700 pound load, would swing just a quarter turn. [12]

It came down, we will say, lengthwise if this represents the board. They wanted to turn it a quarter turn, so that it would be crosswise with the ship.

You can follow the evidence on that.

In so turning it just the quarter turn, this very heavy load, as it started to turn, Mr. Hawley found it was not turning the way he thought it would turn, but the other way, and the evidence will show it pushed him in the stomach, or abdomen, and it didn't strike any hard blow, but in the nature of a glancing blow, but it would be only at the very beginning of this quarter turn of this very heavy object.

The evidence will show then that he complained following that, that he had certain drainage and difficulty in that particular area of his abdomen that he will describe for you.

The evidence will show that following the incident, Mr. Hawley received certain treatment at the Public Health Hospital in Seattle, and that following his convalescence, the evidence will show that he has had no permanent disability from the injury, and that he has returned to sea, and that he has been sailing substantially since the time of his becoming fit for duty since treatment, and that he is as fit as he was prior to the accident.

Mr. Kane: Mr. Hawley. [13]

RICHARD T. HAWLEY

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Kane): Now, if you will, Mr. Hawley, will you direct your remarks to the Jury?

(Testimony of Richard T. Hawley.)

Will you state your name, address and occupation?

A. My name is Richard T. Hawley, and I live at 912 First Avenue, Seattle, Washington, and I am a Merchant Seaman. I have been a Merchant Seaman for 31½ years.

Q. Now, what type of vessels have you sailed on during your career, Mr. Hawley?

A. I have sailed on practically every type there is that is going to sea now.

Q. And you mean by that, upon passenger and cargo?

A. Passenger and cargo, and steam schooners.

Q. And has your sailing career been devoted to the activities on the West Coast?

A. I have been on the West Coast ever since 1923.

Q. And have you ever sailed on previous occasions to Alaska?

A. I have some with the Coastwise Lines.

Q. And have you sailed to Alaska on previous occasions [14] with Alaska Steam?

A. I was on another, a few months before I was on the Square Sinnet.

Q. What documents do you hold from the Coast Guard?

A. I have Watertender, Oiler, and Wiper, and Lifeboatman.

Q. What was the last, please?

A. Lifeboat.

(Testimony of Richard T. Hawley.)

Q. Now, on board, what department do you sail in? A. I sail in the engineroom.

Q. Now, have you ever had any injuries other than this other injury that you received on August 21, 1953?

A. In 1937, I had a rupture, caused by a bad cold, on the American Mail Line. That was in 1946, I mean.

And, in 1935, I was—had a leg injury on the American-Hawaiian Steamship Company.

Q. Now, do you recall any other accidents that you had?

A. Well, I had a finger amputated in a machine shop when I was thirteen years old.

Q. Now, can you think of any other accident that you have had?

A. No other accident, at all.

Q. Now, you recovered from those injuries?

A. Yes, sir.

Q. And you had recovered from those injuries prior to [15] your sailing on the Square Sinnet?

A. Yes, sir.

Q. You never had any type of post-operative infections from those injuries?

A. Nothing at all.

Q. What was your answer?

A. Nothing at all. I never had no infections or anything.

Q. Now, or on about August 21, 1953, Mr. Hawley, what were you engaged in?

(Testimony of Richard T. Hawley.)

A. I was engaged in working cargo in No. 1 hold on the M. V. Square Sinnet.

Q. Now, what was that initial you gave?

A. M. V.

Q. What does that mean?

A. Motor Vessel.

Q. And the name of the vessel was what?

A. Square Sinnet.

Q. Now, when did you sign on that vessel?

A. I signed on around the first of August.

Q. Where did you sign the articles on that vessel?
A. Seattle, Washington.

Q. And where did you go to from Seattle?

A. We went to—we were in Kodiak and a couple of other ports in Alaska. [16]

Q. That is on the trip north?

A. That is on the trip north, yes, sir.

Q. Did you have general cargo on board?

A. General cargo going up; and on the way back, we loaded salmon.

Q. On the trip, up, did you assist in the loading of the cargo?

A. No, they have sufficient—in some of the ports, they have sufficient longshoremen; and in the cargo ports, they have longshoremen, but in the small canneries, they have to use the crew for longshore work.

Q. Now, on or about the 21st of August, 1953, Mr. Hawley, what port in Alaska were you in?

A. It was an Indian name, Uganic, on the island of Kodiak.

(Testimony of Richard T. Hawley.)

Q. Now, what duties were you engaged in on that day?

A. We were turned to to work cargo in the No. 1 hold.

Q. What time did you turn to?

A. We turned to at seven o'clock in the morning.

Q. Now, Mr. Hawley, what do you mean by the expression "turn to"?

A. That means time to go to work. You have six o'clock breakfast, and turn to to go to work at seven o'clock.

Q. And did you do that at that time?

A. I did.

Q. And what hold were you working in? [17]

A. No. 1.

Q. And what type of cargo were you——

A. (Interposing) We were loading cased salmon.

Q. You mean by that, you were taking cased salmon from the dock; you were part of the crew that were taking cased salmon from the dock and placing it on the vessel? A. Right.

Q. Now, what portion of the vessel were you working in?

A. On the port side of the ship.

Q. What do you mean by the expression, "the port side of the ship"?

A. Well, on the ship, the right-hand side is the starboard, and the left-hand side is the port.

(Testimony of Richard T. Hawley.)

Q. And what part of the deck were you working on?

A. We were working in the lower hold.

Q. What do you mean by that expression?

The lower hold, well, it is between decks and a lower hold. You have to go down a ladder into the bottom hold.

Q. You mean by that, the bottom of the ship?

A. The bottom of the ship.

Q. And you were down there, and you reported there at seven o'clock in the morning, and you were engaged in storing cargo?

A. Stowing salmon, yes, sir. [18]

Q. When you said you were on the port side, what was being done on the starboard side?

A. There were five men on each side. They have a gang of ten men in the hold, and they split them up, five on each side.

Q. Will you explain to the jury just how this cargo was being lowered down?

A. It was lowered down by a pallet board, and we had to go to work and get ahold of it, and swing it, and run it underneath the hatch coaming, as far as we could, in order to gain a little in lee-way so that four of us could work off the board at the same time.

Q. Now, what do you mean by that expression, four of you work off the board at each time?

A. Well, that is in order to get it in far enough so that one man could take each corner of the board and lift the salmon off and get it off as

(Testimony of Richard T. Hawley.)

quick as we could, so that we could get more loaded.

Q. In other words, you were taking the salmon cases and stowing them——

A. (Interposing) Stowing them in under the wing of the ship.

Q. And you were engaged at the time with the crew working on the port side wing?

A. Yes, sir.

Q. Now, how long had you been working there? How long [19] that morning did you work there?

A. I started at seven, and I got hurt at 8:30.

Q. Now, would you describe to the jury just what happened at approximately 8:30 the morning of August 21, 1953?

A. At seven o'clock in the morning, when we started moving cargo, there was five of us in the hold, together, and we had an agreement to swing the board clockwise.

Mr. Holland: Just a minute. The question was, what happened at 8:30.

The Witness: That is what I am coming to.

The Court: It is preliminary. That was the question.

Mr. Kane: Yes, your Honor.

Q. (By Mr. Kane): What happened?

The Court: If you will, start over again.

Mr. Kane: Will you have the reporter read his remarks, so far?

The Court: Mr. Reporter, read the answer.

(Whereupon, preceding answer was read by the reporter.)

(Testimony of Richard T. Hawley.)

A. We were swinging these boards——

Q. (By Mr. Kane): Now, you may continue.

A. (Continuing) And, in order to swing it clockwise, [20] I was walking on the forward side, on the inboard corner, and we were swinging it clockwise in order so that I could get out from behind, because we had three tiers of salmon already behind, already loaded, and I was underneath the hatch coaming, and the other three fellows were in the wing, and one fellow would take the after side of the inboard corner, and we would swing the board clockwise, and then swing it aft, and at 8:30, when I got ahold of the board, I was between the board and these cases of salmon, and the fellows made a mistake and swing it counter-clockwise, and they caught me between the cases of salmon and the board, and as soon as it happened, why, the fellow that was working on the same side of me was a ship's delegate for the Sailors' Department, and I reported to him to watch it, and be a little more careful because it hit me in the stomach with the board, and be a little more careful and we could go to work and swing it clockwise again, because there were three cannery workers in the hold, two young fellows and an old fellow who were inexperienced. They had never worked in the cargo before.

Q. Now, Mr. Hawley, you told the jury that you wanted to turn this pallet board clockwise. Will you explain to them what you mean by "clockwise", and what the purpose of that was?

(Testimony of Richard T. Hawley.)

A. The purpose of that was in standing inside underneath the wing, we have to get in out of the square of the hatch [21] while the load is coming in case one of the boxes or something should fall off, and I was standing in on the forward end, along these cases of salmon, underneath the hatch coaming, and the other four fellows were back in the wing, and the sailor delegate, he would come out from the after end and get the inboard corner, and I would walk over and grab the forward inboard corner, and I would swing it towards him and he would take the corner I got, and we would turn the load back three or four feet, and swing it as far as we could, to gain a little more leeway on the load.

Q. What was behind you, Mr. Hawley?

A. Three tiers of salmon, seven high, and we had filled the forward hold and we were working into the wing of the ship. We had to work from the center to the skin of the ship, so that there would be no holes left in order not to cause a hazard when somebody unloaded the ship.

Q. How far out in front of you was this platform of salmon packed to act as a receptacle for the pallet board when it came down?

A. From three tiers. You see, they were working under a hazard, because they had the after end of the hold——

Mr. Holland: (Interposing) If the Court please, I don't think this is responsive. Most of them have been leading.

(Testimony of Richard T. Hawley.)

The Court: I think the answers are not responsive in some degree. Much of it, however, is outlining [22] what happened. There are some answers that are conclusions that should be stricken.

Mr. Kane: Yes.

The Court: The last comment as to what the hazard was, may be stricken.

Mr. Kane: We have no objection.

Mr. Holland: May the jury be instructed to disregard it?

The Court: Yes. Matters stricken by the Court are to be disregarded by the jury, and that applies to any witness, and when there is objection, and the objection is sustained, the jury will disregard the question and any inference that may result.

So that, if you will, you may continue, Mr. Hawley, and if you will bear in mind in your answers the questions and, if he wants to enlarge, he will ask further questions. You may proceed. Do you want to re-state the question, or have it read?

Mr. Kane: Yes, if you will.

The Court: Have it read?

Mr. Kane: Yes.

The Court: The reporter will read the question.

(Whereupon, preceding question was read by the reporter.)

A. (Continuing) To the section where the pallet board [23] was coming down, or the whole section entirely?

Q. (By Mr. Kane): Where the pallet board was coming down.

(Testimony of Richard T. Hawley.)

A. It was three feet from the edge of the cases of salmon where we were working.

Q. What do you mean by "three feet from the edges of the cases of salmon"?

A. You see, three loads of salmon in the forward end of the hold. There was about 24 inches clearance between there and the edge of the hatch coaming, and the pallet board, and the winch driver brings the pallet board down as close as he could, and as close to the hatch coaming as he could.

Q. In other words, he would bring it as close to your end as he could? A. As possible.

Q. Why would he do that?

A. On account of the loading of the hold, they have the booms swung out, because we were only working on the forward end of the hold.

Q. Well, now, who was the man working on the other side of you? A. Perry.

Q. Now, did you have an opportunity to observe where he was standing? [24]

A. They were underneath.

Q. Answer the question: did you have an opportunity? A. Yes.

Q. Now, will you tell us, or describe to the jury, where he was standing?

A. He was underneath the wing of the ship, and he would have to walk out on the outside of the pallet board, in order to get the corner on the inboard after end.

Q. Now, why would he have to do that?

A. Because on account of the load coming down,

(Testimony of Richard T. Hawley.)

for safety, everybody stepped underneath the hatch coaming, in case anything should fall off the load.

Q. How far behind him was the salmon packed, giving him this platform to work on?

A. Approximately five feet.

Q. Could he go beyond that, any farther than that? A. No, he could not.

Q. Why?

A. Because on the after end of the hold, they had fish meal loaded, and they had to leave a space between the fish meal and the cases of salmon in order not to cause damage.

Q. What do you mean by "in order not to cause damage"?

A. Well, this fish meal would soak into the cases and could spoil all the cases.

Q. In other words, there was a space—— [25]

Mr. Holland: (Interposing) This is leading, if the Court please.

Mr. Kane: I will withdraw the question.

Q. (By Mr. Kane): (Continuing) What was the distance between the fish meal and the cans of salmon? A. About four feet.

Q. And how high up was Mr. Perry working?

A. We were eight tiers up, eight cases of salmon high. That would be about twelve feet off the bottom of the deck.

Q. In other words——

Mr. Kane: I will withdraw that.

Q. (By Mr. Kane): (Continuing) Now, **Mr.**

(Testimony of Richard T. Hawley.)

Hawley, how many men were in this gang that you were working with? A. There was five.

Q. Five men; you have said that Mr. Perry was one. Who were the others?

A. There were three cannery workers, two young fellows, one about eighteen and one about twenty, and then another fellow was about forty.

Q. Now, where was this cargo coming from?

A. Out of the cannery.

Q. Well, I am presuming that; but, more closely, immediately, to you? [26]

A. Well, they were taking it off the dock and swinging it over into the holds.

Q. Where were these pallet boards loaded?

A. They were loaded on the dock, and they were taken down in a jitney and packed in front of the ship, and from there picked up by winches and loaded into the hold of the ship.

Q. Now, did you ever have any occasion to see any mates observing this loading operation?

A. There was one mate in charge; he was in charge of all the holds. He traveled up and down from one hold to the other, at periods of times.

Q. Had you seen him at all that morning?

A. We seen him in the mess room when he come and turned us to.

Q. Now, who was in charge of this operation here?

A. Well, there was nobody but on the agree-men on each side of five men working, they always picked one man out in order to run the gang.

(Testimony of Richard T. Hawley.)

Q. Was that done at this time?

A. Well, the way we agreed on Mr. Perry taking over and any instructions he gave, we would observe.

Q. Now, had you an occasion during this time of loading to see this pallet board coming down?

A. No, we were underneath the hatch coaming until the [27] board came down level with us, and then we would walk out and get ahold of it.

Q. You never had an opportunity to observe this pallet board coming down below the square of the hatch?

A. We always watch the bottom, because on account of the swinging motion, or coming too fast, if there were any tips or anything like that, you always watch up in order to see if anything was wrong with the load before you stepped out into the center of the hatch.

Q. Now, did you have, at this time, any occasion to observe it?

A. At that time, we were watching the board and it was coming pretty fast, and they were loading——

Q. (Interposing) That is the next question I will ask you, Mr. Hawley. Will you describe to the jury how the pallet board was coming down?

Mr. Holland: Now, if the Court please, the witness said he did not observe it.

Mr. Kane: I thought he did.

The Court: He didn't directly answer the ques-

(Testimony of Richard T. Hawley.)

tion, I don't believe. You may ask him that question, Mr. Kane, if he observed it.

Q. (By Mr. Kane): Had you at any occasion from the time you went to work there observed this pallet board coming down? [28]

Mr. Holland: Now, if the Court please, that is immaterial, since Counsel changed that to include the whole morning. I understood he was referring to this particular load. Any other loads would be immaterial what happened.

Mr. Kane: All right, I will confine it to this particular load, if Counsel wants me to.

Mr. Holland: Yes, sir.

Q. (By Mr. Kane): (Continuing) Had you an occasion to see this load coming down on the pallet board? A. We watch every load.

Q. Answer. Go ahead. That is not responsive.

The Court: The question is this load. Did you see this load?

The Witness: Yes, I seen this load coming down.

Q. (By Mr. Kane): Now, will you describe to the jury how this particular load came down?

A. She came down in a swinging motion, and as we walked out and got ahold of the lines, we always walk out to get ahold of the lines, more or less every load swings a bit, and each one grabbed the line to stay the load before we could swing it underneath the hatch coaming.

Then we walk out to the center of the hatch and [29] push it in as far as we could. That is the

(Testimony of Richard T. Hawley.)

proper procedure we were going through all morning.

Q. Now, at that time, Mr. Hawley, did you see any hatch-tender up in the square of the hatch giving any signals to the winch driver?

A. From down——

Q. (Interposing) Answer the question “yes” or “no”.

A. No, you cannot see from the port side.

Q. You couldn't tell whether there was anybody up there or not? A. No, couldn't tell.

Q. Now, you have testified previously that behind you was this—these cases of salmon, a regular wall of salmon, is that right?

A. That is correct.

Q. Was there anything else around that immediate area?

A. An escape ladder right in the center of the hatch, in the center of the loads. The starboard gang works from one side of the ladder, and the port gang from the other side of the ladder.

Q. Now, Mr. Hawley, what do you mean by the expressions “escape ladder”?

A. Well, there is a ladder to get from the lower hold to the bottom deck, and then another ladder from the bottom [30] deck the main deck that goes through the escape hatch.

Q. In relation to this ladder here, where were you standing?

A. I was standing three feet inside the ladder on the port side.

(Testimony of Richard T. Hawley.)

Q. Now, when you testified you were standing inside three feet, do you mean you were——

A. (Interposing) From the edge of the ladder.

Q. And that is, towards the port side of the vessel?

A. That is towards the port side of the vessel.

Q. Now, when one pallet board would go up, would another pallet board come down in the same side, or location?

A. No, after we had landed our load, we would take the bridle off, and they would move it over to the other side of the ship and pick up an empty board and the next load would go to the starboard side, and then we would take the bridle and hook onto our empty board, and have that taken out and wait for the next load.

Q. Will you describe to this jury here the area in which you had to work, as this pallet board came down and you were swinging it in relation to distance?

A. Well, I would say we were only using the forward half of the hold, and from the tier of salmon where we already loaded, and we put in three tiers in the square of the hatch, I would say about 15 feet. [31]

Q. That is the whole area?

A. No, that is straight back, and then across the whole ship.

Q. Now, when this pallet board would come down, how close would it be to you?

A. It would be within three feet.

(Testimony of Richard T. Hawley.)

Q. Could you step back at all?

A. You couldn't step back. You could step back underneath the hatch coaming while it was coming down, but when the board was swinging that way, I was caught between——

Mr. Holland: (Interposing) The question has been answered, if the Court please.

The Court: The Court will caution the witness to listen to counsel's question, and try and answer directly without the explanation. Then if counsel desires, he can ask you to explain it.

Now, I am going to strike this answer, and ask the reporter to read the question and listen to the question, and attempt to answer it. And, Mr. Kane will ask you to explain it, if he thinks you should.

(Whereupon, the last question was read by the reporter.)

Q. (By Mr. Kane): Just answer "yes" or "no". A. No. [32]

Q. Now, what prevented you from stepping back, Mr. Hawley?

A. Three tiers of salmon that we had already loaded in the forward part of the hold.

I either had to go to the starboard side, or the port, in order to get out of the way.

Q. Now, why didn't you go to the starboard side?

A. Because, on account of the ladder at the time, and the pallet board was down too close. It was swinging in, and I could not move on account of the ladder. I was between the ladder and the

(Testimony of Richard T. Hawley.)

pallet board, and if I had turned around, and went the other way, which is about nine feet, I would have got hit in the back with it.

Q. As you say, if you went the other way—what way is that?

A. To the skin of the ship.

Q. On what side of the ship? A. Port.

Q. Now, will you try to describe just as well as you can how this pallet board was sitting when the man grabbed it, to move it?

A. She was in a 'thwartship position.

Q. I think you had better explain to the jury what you mean by "'thwartship position". There is a long side and a short side to the board, and we have always tried to get the [33] long side in and swing it under so that we could work off the corners, and if you come down athwartship—that is, crossways—we would swing it one-quarter turn in order to bring it underneath the hatch coaming and set it down in the proper position.

The Court: It is twelve o'clock, Mr. Kane. Do you wish to recess now?

Mr. Kane: Yes, sir.

The Court: Members of the Jury, we will now take the noon recess, and the Court calls your attention to the admonition I gave you at the time of the mid-morning recess, and asks you to heed it on this occasion.

You may now be excused, and come back about ten or fifteen minutes early. You may now be excused.

(Testimony of Richard T. Hawley.)

(Whereupon, the jury retired from the courtroom.)

The Court: What testimony do you have, Mr. Kane? Do you have medical testimony?

Mr. Kane: Yes, your Honor. We will have a doctor, and we also have two depositions.

The Court: Any other live witnesses?

Mr. Kane: And the Marine Hospital.

The Court: I doubt very much if we can finish this afternoon.

Mr. Kane: I would rather go over until Tuesday morning on account of the Doctor. Yesterday was a day off for the [34] medical profession in town, and I couldn't get ahold of him at all, and I couldn't get ahold of him Wednesday.

The Court: I have in mind, even if we finish the testimony, it will be close to six o'clock, and with argument, and we had a jury out until midnight last night, I don't want to go through the same long day again, not only for myself, but for the rest of the personnel.

Mr. Kane: If agreeable with counsel, we can put everything in today.

The Court: If you get your testimony in, we can start earlier on Tuesday, if you want to.

Mr. Holland: Anything is agreeable.

Mr. Kane: Yes, sir.

The Court: So that, unless testimony is completed today by 3:30 or something like that, if you can have your testimony by that time, I might go on, but if it is any time after that, I wouldn't.

(Testimony of Richard T. Hawley.)

The Clerk: We have two pre-trials Tuesday.

The Court: Well, we would have to start at ten o'clock.

Mr. Holland: Yes, sir.

The Court: We will recess now until two o'clock.

(Whereupon, at 12:05 o'clock p.m. January 7, 1955, a recess was had until 2:00 o'clock p.m. January 7, 1955, [35] at which time the following proceedings were had, to-wit:)

The Court: You may call the jury.

(Whereupon, the jury was returned to the courtroom.)

The Court: You may be seated.

Mr. Hawley, the plaintiff, will resume the stand.

Mr. Kane: I would like to have the easel, if it please your Honor.

The Court: Yes, the Bailiff will get it.

Can you proceed with something else, while you are getting it?

Mr. Kane: Yes, sir.

Q. (By Mr. Kane): Now, Mr. Hawley, did you make a drawing or sketch of the vessel which you were working on? A. Yes, sir; I did.

Q. That is, did you make a drawing or sketch of the vessel as it was in the No. 1 hold on or about August 21, 1955?

A. Yes, as far as my knowledge is, and the best of my ability.

Q. And, in that drawing, you designated just where the cargo was, and the pallet board?

A. Yes, sir.

(Testimony of Richard T. Hawley.)

Q. And you also designated the particular area where [36] the men were working; you identified those areas?

A. Yes, sir.

Q. Now, what are your duties as a wiper aboard this vessel, the Square Sinnet?

A. Well, the duties of a wiper is to do any cleaning or assist in the engine in any repair work.

Q. Now, in what area of the ship is your work usually confined to?

A. To the engine room.

Q. Now, what were the circumstances of your doing the stevedoring work?

A. Well, they have a contract with the Fireman's Union that any time there is no longshoremen available, that the Fireman's Union has agreed to assist the sailors in helping unload cargo.

Q. And you were directed by some member of the staff of the vessel to join this group in No. 1 hold?

A. As is custom with the Alaska Steam, any day workers or anything else, the first engineer, the first mate and first engineer has him knock any day man off he doesn't need down below, in order to help work cargo as per the agreement.

Q. Now, who directed you to the No. 1 hold?

A. The first assistant came down and told us that the mate needed some men on deck, and it was all right to go up and turn to and work cargo in the holds. [37]

Q. Who told you to go to the No. 1 hold?

A. That was the first mate.

(Testimony of Richard T. Hawley.)

Q. And who did you report to there?

A. I reported to the delegate, the Sailors' delegate.

Q. Now, who was the Sailors' delegate?

A. Mr. Perry.

Q. What function did he have there in this hold?

A. Well, he is the Sailors' delegate. He takes— keeps track of all time and all the men working in the hold, and keeps track of the time.

Q. Does he do anything besides this bookkeeping?

A. Well, he works in the hold himself.

Q. Does he do anything in regards to the cargo?

A. He was working in the hold at the same time we were.

Q. Does he have anything to do with the supervision or direction of the work?

A. Well, in a way, but the mate in charge is supposed to go from one hold to the other.

Mr. Holland: If the Court please, this is not responsive to the question.

The Court: Objection sustained. Again, Mr. Hawley, I will ask you to listen to the question, and then attempt to answer it as Mr. Kane puts it to you, and if he wants explanation, he will ask you for it.

The Witness: All right. [38]

Q. (By Mr. Kane): Does this delegate, Mr. Perry, have anything to do with the supervision, how the men are distributed?

(Testimony of Richard T. Hawley.)

Mr. Holland: That is objected to as leading.

Mr. Kane: I will strike the latter part.

Q. (By Mr. Kane): (Continuing) Answer "yes" or "no".

Mr. Holland: Well, it is still leading.

The Court: Having anything to do with supervision, that was the question?

Mr. Holland: Yes, I would say that was leading.

The Court: He may answer "yes" or "no".

Mr. Kane: As to whether he does or does not.

The Court: Yes.

A. Yes; yes, he has charge of the——

Q. (By Mr. Kane): Now, just say "yes" or "no". A. Yes.

Q. Now, what are his duties there as far as you know from your activities in this No. 1 hold on the 21st of August, 1953?

A. Well, he is, according to their agreement, he is, supposed to see that there is a full capacity of men in the hold at all times.

Q. What did he do this day when you reported down [39] there? You reported to Perry, what did he do?

A. Well, there was ten men sent to the hold at one time, and he divided them up into two different groups.

Q. Did he do anything else after that?

A. And in making up the gangs, he put two sailors and three from the engine room on one side, and him and three cannery workers and myself on the other side.

(Testimony of Richard T. Hawley.)

Q. And he directed you and told you where to work?

A. Yes, he directed me where to work.

Mr. Holland: If the Court please, this exhibit has not been identified or marked, and it is being exhibited to the jury.

The Court: Is this covered by your pre-trial order?

Mr. Holland: No, it is not.

The Court: I think you had better identify it.

Mr. Kane: I am, your Honor. I will do it right now.

The Court: Ordinarily, it should be identified before it is showed.

Mr. Kane: All right.

The Court: However, if he can identify it——

Mr. Kane: (Interposing) I thought I laid a foundation, that he had made it.

The Court: You haven't connected it yet.

Mr. Kane: That is what I will do now. [40]

Q. (By Mr. Kane): Mr. Hawley, showing you the diagram on the easel, will you tell us what that is?

A. That is as close as I can come to where the cargo and the different tanks and different things, cargo and everything, is in No. 1 hold, at the time we were working in the No. 1 hold.

Q. Where was this diagram drawn, Mr. Hawley?

A. I drew it up in your office, one day, when I was out from the hospital there.

(Testimony of Richard T. Hawley.)

Q. Now, Mr. Hawley, did you also draw another diagram there?

A. Yes, I drew a couple of diagrams.

Q. I show you this, Mr. Hawley, and ask you to tell me what that is.

The Court: You had better have it marked first, Mr. Kane, just for identification.

Mr. Holland: May we have the other one marked, too, your Honor?

The Court: Yes, we will mark them both for identification.

You had better mark this one, too, and that one, "1".

The Clerk: I can go over there and mark it.

The Court: All right. She will mark it over there, Mr. Sommervel. [41]

The Clerk. Plaintiff's exhibit 1 marked.

(Plaintiff's Exhibit No. 1 marked for identification.)

The Court: The record will show that that is what the plaintiff was first referring to here, when talking about a chart.

Mr. Holland: Agreeable.

The Clerk: Plaintiff's Exhibit No. 2 marked.

(Plaintiff's Exhibit No. 2 marked for identification.)

Q. (By Mr. Kane): Now, Mr. Hawley, I am showing you Plaintiff's Exhibit 2, and ask you to tell the jury and Court what that is?

A. That is the drawing I made myself, with my own hands, and my own handwriting on it.

(Testimony of Richard T. Hawley.)

Q. And what is that drawing an impression of?

A. That is the impression of the No. 1 hold, and the different parts of the hold, and the cargo spaces.

Q. Now, Mr. Hawley, I would like you to come up here to the easel and mark with this pencil where you were standing. That is, mark on Exhibit No. 1 just where you were standing.

Mr. Holland: If the Court please——

The Court: (Interposing) Just a moment. It isn't admitted, yet. [42]

Mr. Kane: Well, I didn't want to have it admitted until I had it marked.

The Court: Well, I think that is testimony, and I think it has to be admitted before he can testify to that.

Mr. Kane: Well, at this time, I will offer it.

Mr. Holland: May I ask the witness about it, your Honor?

The Court: Yes, you may.

Mr. Holland: Mr. Hawley, Plaintiff's Exhibit No. 1, which is on the blackboard, was drawn by you yourself, was it?

The Witness: Yes, sir.

Mr. Holland: I understood you told us that Plaintiff's Exhibit 2, you said, was a drawing that you drew yourself. I thought that you emphasized that No. 2 you drew yourself. Did you mean you drew both?

The Witness: No, this was a copy of No. 2.

Mr. Holland: Then did you draw No. 1?

(Testimony of Richard T. Hawley.)

The Witness: No, I assisted in it. Mr. Kane did it.

Mr. Holland: I see; and did he use Plaintiff's Exhibit No. 2?

The Witness: He took it off of Exhibit No. 2, yes, sir.

Mr. Holland: I see, and as far as you recall, does that substantially show the condition of the hatch? [43]

The Witness: That shows the condition of the hatch at the time I got hurt.

Mr. Holland: Now, in that picture, or in that drawing, Mr. Hawley, it appears that we are looking at the ladder. Is that the way the ladder is?

The Witness: No, the ladder is the other way.

Mr. Holland: Then, actually, if we were looking at the ship that way, we couldn't see the rungs, could we?

The Witness: No, sir.

Mr. Holland: Is there any other part of that chart that isn't exactly the same as you recall it?

That part is different, you admit that?

The Witness: The ladder wasn't in there.

Mr. Holland: Is there any other part of the chart different than the ship was?

The Witness: No.

The Court: What was your answer?

The Witness: No, sir.

Mr. Holland: We have no objection.

Mr. Kane: I will offer Exhibit No. 1 in evidence, your Honor, and also Exhibit No. 2.

(Testimony of Richard T. Hawley.)

Mr. Holland: May I see Exhibit No. 2, please?

Well, if the Court please, I find on the sketch, on Plaintiff's Exhibit No. 2, there is a narrative summary of what the witness claims happened, and I don't think it is [44] proper. I have no objection if that part is removed.

Mr. Kane: I have no objection to removing it.

The Court: No objection to removing it?

Mr. Kane: No.

The Court: Can you just clip it off?

Mr. Holland: I have no objection now to Plaintiff's Exhibit No. 2.

The Court: All right, Plaintiff's Exhibits 1 and 2 for identification may be admitted.

(Plaintiff's Exhibits 1 and 2 received in evidence.)

Q. (By Mr. Kane): Now, Mr. Hawley, I would like you to come to the easel here and mark on Plaintiff's Exhibit 1 just where you were standing.

(Whereupon, the witness went to the exhibit and marked it as directed.)

Q. Now, how have you marked that, Mr. Hawley?

A. I was on the port side of the ladder.

Q. Why don't you stand back so that the jury can see it? How did you mark it?

A. That is where I was standing in the hold.

Mr. Holland: I will stipulate he put an "X" by the spot. [45]

Q. (By Mr. Kane): You marked an "X" indicating the place where you were standing?

A. I marked an "X" where I was standing.

(Testimony of Richard T. Hawley.)

Q. Now, you were asked, in identification of the diagram, the manner in which the ladder was running up and down in the vessel.

A. The ladder was running up and down on the forward end of the hatch.

Q. Now, would you explain to the jury how you would turn that ladder around which would give it a replica of the area in which you were working?

A. The ladder was salmon loaded from this side of the ladder out to the side of the ship.

Q. You are not answering. How was the ladder? was it against——

A. (Interposing) It is against the salmon here. There was salmon loaded up behind it all the way to the top.

Q. In other words, if we were looking at the vessel from the position you were in, all we could see is the outer room?

A. The outer room, and three tiers of salmon behind.

Q. With the cargo already loaded?

A. With the cargo already loaded.

Q. Now, Mr. Hawley, would you mark on the diagram where Mr. Perry was standing? [46]

A. Mr. Perry was back in the wing of the ship, over here. I will mark it with a "P". He was in the wing of the ship.

Q. And where were the other men standing that were working with you?

A. They were alongside of Perry, underneath

(Testimony of Richard T. Hawley.)

the hatch coaming back in here. I will mark 1 and 2, and the other fellow was over on this side.

Q. Now, what side of the vessel were they on?

A. They were on the port side.

Q. Now, what is that squared off area in which you were standing upon?

A. That is 8 tiers of salmon, already loaded.

Q. And what was the area between the back of the ladder and the bulkhead, or——

A. (Interposing) Between where?

Q. Between the back of the ladder and the bulkhead or deep tank?

A. There was three tiers of salmon in there.

Q. Would you put an "X" there, and would you put an "S" on the platform of salmon which you were standing on?

A. This was 8 tiers high.

Q. Now, Mr. Hawley, would you explain to the jury what is this area back here where you have that line drawn?

A. Back in here, they loaded—— [47]

We went to some little port right out——

The Court: (Interposing) Just say what it was.

The Witness: Fish meal.

Q. (By Mr. Kane): Put the letter "M" there. What is the connotation of that line that has that particular angle, Mr. Hawley?

A. That is the sacks of fish like the way they were stacked, because they wouldn't stack straight, because they were loose. They were loose sacks,

(Testimony of Richard T. Hawley.)

weighed about 150 pounds, and it was fish meal, fertilizer is what they call it.

Q. Now, Mr. Hawley, what was in that space between the salmon and the fish meal?

A. There was nothing in the space. There was a four-foot space left here in case these sacks lowered down, so that it wouldn't get against the cases of salmon, and spoil the cargo.

Q. Could you give us a replica of how this cargo came down? Show the members of the jury a replica.

The Court: Why don't you turn it back this way, and the jury can see? If you can't see, Mr. Holland, you can come up here.

Mr. Holland: Thank you.

A. That is from the winches on the pallet board we were working on. [48]

Q. (By Mr. Kane): Now, Mr. Hawley, will you describe to the jury now how you were working in this area when that pallet board came down with that cargo on it?

A. There is one little fact missing, right in here, from the between deck where the hatch coaming comes down on the other side of this here.

Mr. Holland: That is objected to as not responsive.

Mr. Kane: May he read the question?

The Court: The reporter will read the question.

(Whereupon, preceding question was read by the reporter.)

A. (Continuing) I was standing forward here

(Testimony of Richard T. Hawley.)

underneath the hatch coaming, and I would walk out and take one corner of the sling and Perry would walk out and catch the other corner of the sling, and the other three fellows would take the other side, and we would swing the load around, and underneath where we wanted to work.

Q. (By Mr. Kane): What happened at the time you were injured? Will you tell the jury that?

Mr. Holland: This is repetitious, unless counsel is asking that some mark be put on the diagram.

Mr. Kane: I want him to show by the movement of the pallet board, your Honor.

Mr. Holland: I object, except any movements or where [49] he went that doesn't show in the record. If he wants to draw the diagram again, without marking, all right. I think it shows in the record. If he plans to mark it, it is all right.

The Court: Is there any further marking?

Mr. Kane: Yes, he is going to mark where he was struck, your Honor.

The Court: If he can, do so.

A. I was underneath the hatch coaming here, and I stepped down into the center of the hatch to grab ahold of this corner of the pallet board here, and in the meantime, they swung counter-clockwise, instead of clockwise, and knocked me back against the cases of salmon, just past the ladder. I could not jump out, because the ladder was on this side of me, and on the other side, I had too far to go.

Q. (By Mr. Kane): At any time, did you ask

(Testimony of Richard T. Hawley.)

them to drop the pallet board away from you, farther away?

Mr. Holland: Objected to as leading.

The Court: Objection sustained.

Mr. Kane: I will withdraw the question, your Honor.

The Court: Are you through? Is he through there?

Mr. Kane: No, your Honor.

The Court: All right. [50]

Q. (By Mr. Kane): Mr. Hawley, will you tell the jury why the pallet board came down in this particular place, if you know?

A. Working in the small space area here, they brought this pallet board down as close to the forward end of the hold as they could in order to give the men in the after end space to get out and work on the pallet board at the same time.

Q. Now, is there any railing or anything up in the rear area where Mr. Perry was working?

Mr. Holland: Objected to as leading, if the Court please.

The Court: Objection sustained.

Q. (By Mr. Kane): (Continuing) Now, after you were injured on this vessel, Mr. Hawley, what did you do?

A. As soon as I got hit with this load of salmon, I went to work and told Mr. Perry, I said—

Mr. Holland: (Interposing) Now, I object to any conversation with Mr. Perry.

Q. (By Mr. Kane): Just tell what you did.

(Testimony of Richard T. Hawley.)

A. I reported to the Sailors' delegate that I got hit, and to watch it in the near future.

Q. What did you do after that?

A. We continued working until 11:40. [51]

Q. And what took place after that?

A. At 11:40, I was lifting up a case of salmon, and it slipped out of my hands, and I couldn't lift any more, and I rode the pallet board up on the next load, and knocked off.

Q. What do you mean by "knocked off"?

A. I quit. I went up and went to bed.

Q. Did you report to anyone at that time?

A. I reported to Perry.

Q. When you were leaving?

A. When I left the hold.

Q. Now, did you seek any medical attention when you went up?

A. No, I went up and laid down in my bed, and I figured I might be all right at 1:00 o'clock again.

Q. Did you have any dinner at that time?

A. I did not.

Q. And what did you do at 1:00 o'clock?

A. At one o'clock, the boatswain come and asked me if I was turning to, and I told him no, that my stomach was paining me, and I stayed in bed.

Q. And what happened after that?

A. I fell asleep, and I woke up at six o'clock at night, and I went to the first mate's room for medical treatment.

Q. And did he give you any medical treatment at that [52] time?

(Testimony of Richard T. Hawley.)

A. At that time, he told me that the third mate was in charge of the medical treatment, and that the third mate was in charge of the medical treatment, and that the third mate was in bed, and I knocked on the third mate's door, and he did not answer, and I went back and reported to him that the third mate was asleep and wouldn't answer his door, and he told me the third mate would be up at midnight and to come back then, and I told him at that time I got hurt in the hold, and I would like some liniment and thought I had a bruised stomach.

Q. Did you have occasion to observe your stomach?

A. No, at that time, it was just a little swollen.

Q. Your answer is "Yes, it was swollen"?

A. Swollen.

Q. Then, at 12:30, did you see the third mate?

A. No; at nine o'clock when coffee time came, I called up the engine room delegate, Mr. Sousa, and asked him to go and see the captain and the first engineer and ask them if they could get any medical treatment. If not, I wanted to go to a doctor at eight o'clock in the morning.

Q. And what was the result of that?

A. Sousa went and seen the captain, and the chief engineer, and they came down to my quarters.

Q. And did you get any medical attention at that time? [53]

A. The first engineer went up to the third mate

(Testimony of Richard T. Hawley.)

and got the third mate up and got some liniment to give to me.

Q. And did you put liniment on?

A. I put liniment on my stomach.

Q. Did you have any occasion to observe your stomach at that time?

A. It was still swollen at that time.

Q. What was the color of it?

A. There was swelling in about one foot area, and a little swelling, and kind of red, and I put some kind of liniment in the medicine chest on, that is all they had, and I went back to bed, and I got up at five o'clock in the morning and I looked at it, and it was draining and blood was coming out of my navel, so I went and woke up the third mate again, and the only kind of medicine he had was camphor liniment, and he went up and got the medical book and looked in that, and he couldn't find anything he could do for me.

Q. And then what happened?

A. At eight o'clock in the morning, I reported back to the chief engineer, and asked if I could be taken to a doctor, and they said I would have to go clean across the Island. There was no doctor available.

Mr. Holland: If the Court please, I realize this is part of the aftermath of the injury, but no claim is made [54] for inadequate medical treatment.

Mr. Kane: I will say that the latter part, that there was no doctor that was available, may be stricken. I am interested in the chronology of events.

(Testimony of Richard T. Hawley.)

The Court: The portion of the answer——

Mr. Kane: (Interposing) That recites there was no doctor, except so many miles away——

Mr. Holland: (Interposing) And my objection also will go to any further testimony about what the ship's officers did or did not do for him except it bears on the chronology, because again, there is no claim there was inadequate medical treatment.

Mr. Kane: We have no objection.

The Court: All right, the portion of the answer relating to any testimony at this time, members of the Jury, which may relate to doctors being there or attention being given or not being given is therefore, disregarded, insofar as it may be the ground of any damage. If it comes in, it merely comes in to indicate the course of events.

Mr. Kane: Yes, sir.

The Court: All right.

Q (By Mr. Kane): Now, did you continue to work below——rather, in the engine room for the continuation of the journey? [55]

A. I did not, but on Wednesday morning, I reported to the first assistant, and told him that I turned to, and any light work—that I couldn't do any lifting or anything else, and he said not to turn to, by the chief's order until I seen a doctor and was examined.

Q. And what direction was the vessel headed for at the time?

A. It was headed for Seattle.

Q. And when did you arrive in Seattle?

(Testimony of Richard T. Hawley.)

A. We arrived in Seattle Saturday night on the 30th.

Q. The 30th of what? A. October.

Q. Your injury took place on August 21st?

A. I mean August 30th. I mean August.

Q. Now, what did you do when you arrived in Seattle?

A. On Saturday night, the Marine Hospital was closed, and on Sunday, and on Monday morning I reported and was examined by the doctor, and the doctor advised me to come into the hospital, but I told him the ship was going to pay off in a day or so, and I wanted my clothes off and I had to take a report back to the first engineer I was not fit for duty any more.

Q. Did you do that? A. I did.

Q. Did you have at that time an occasion to observe your [56] stomach in the area?

A. It was still draining.

Q. And when did you become an in-patient in the hospital, if you did?

A. On September 2nd.

Q. And how long did you remain in the hospital at that time?

A. I was in there from September 2nd until October 20th. I had one major and one minor operation in the meantime.

Q. And then were you discharged on October 20th?

A. October 20th I was discharged as an out-patient.

(Testimony of Richard T. Hawley.)

Q. And how long did you remain an out-patient?

A. Until on December 15th, and then I had an infection set in, and——

Mr. Holland (Interposing): This is not responsive.

Q. (By Mr. Kane): Then what happened on December 15th?

A. I reported to the Hospital and they put me in for four days.

Q. That is, you reported at that time because there was something wrong with you?

A. Yes. At the time of the operation, they took an area of two and one-half square inches out of my stomach, lining of my stomach, and left a hernia there.

Q. And what was done at the time when you went back into [57] the hospital?

A. At the time I went back into the hospital, they thought it was just a drainage, and there was still a little drainage there, and they wanted to get it down, but when I was discharged, the surgeon told me to go out and make a trip for three to six months and then come back, and the scar tissue would heal over, and they would go to work and perform the operation on the hernia.

Q. What was the cause of this hernia, if you know?

Mr. Holland: If the Court please, I think that is a medical question. I don't think the witness should be——

(Testimony of Richard T. Hawley.)

Q. (By Mr. Kane) (Interposing): Were you complaining of any hernia prior to this incident?

A. No, it was caused by the operation.

Q. Now, sometime in December of 1953, did you return to the Marine Hospital?

A. On December 23d I reported into the Marine Hospital on account it started to break open and drain again, and I reported into the Marine Hospital, and Dr. Walker, the head surgeon, instructed me, instead of waiting three to six months, to return to the hospital and they would fix it up then, and he told me to report back the day after Christmas, because there was no more operations until after the holiday, and I entered the hospital December 26th and was operated on again the [58] 29th.

Q. 29th of what month? A. December.

Q. 1953? A. 1953.

Q. And how long did you remain in the hospital as an in-patient?

A. I remained there for one month.

Q. And when did you come out of the hospital?

A. January 26th.

Q. And this was 1954? A. This was 1954.

Q. And what did you do at that time?

A. I was an out-patient for a period of fourteen days or so, and then I was marked fit for duty in thirty days, and before the thirty days, it was open again. I was marked fit for duty February 11th.

Q. And what happened after that?

A. I just don't recall the date, but the stitches gave out, and the hernia returned and I had to

(Testimony of Richard T. Hawley.)

return to the hospital again for another operation.

Q. And when did that operation take place, approximately. A. About March 31st.

Q. And did you leave the hospital after that operation? [59]

A. On that operation, the head surgeon in the Marine Hospital took me and put two layers of wire in and I have two layers of wire in my stomach over the hernia section, and I was discharged and not fit for duty for thirty days, and I was fit for duty on June 15th of 1954.

Q. Now, approximately how much time did you lose from your employment, Mr. Hawley?

A. Ten months.

Q. Now, how do you compute that?

A. I don't quite understand that.

Q. Well, what are the months that you figure that you have lost employment?

A. I lost ten months altogether, right from October up until last June, the 30th.

I wasn't able to work at any time during that period.

Q. And you were declared fit for duty on June, 1954?

A. On June 30th is the first time I went to work.

Q. When did you first go to work, Mr. Hawley?

A. June 30th.

Q. What did you ship as at that time?

A. I shipped as wiper on the Shooting Star, American President Line.

Q. How long did you remain on that vessel?

(Testimony of Richard T. Hawley.)

A. Four months.

Q. What is your average monthly earnings, Mr. Hawley? [60]

A. Average monthly earnings in the capacity of—as a wiper, or as an average?

Q. Yes, your average monthly earnings?

A. I averaged around \$550 per month plus my room and board.

Q. How much do you compute your room and board as amounting to, Mr. Hawley?

A. Board and room, what we call subsistence, eight dollars a day, \$240 a month.

Q. Where did you get that figure eight dollars a day?

A. That is from the company any time that a ship does not pay—supply food or lodgings aboard the ship, they pay in lieu of it, eight dollars a day, four dollars for meals and four dollars for room.

Q. Now, how much money have you figured that you have lost due to this injury, in earnings and failure to obtain your board and room?

A. Between \$7800 and \$8000.

Q. Now, Mr. Hawley, you still have the wires in your stomach? A. I have, yes, sir.

Q. Now, how much are you seeking in damages in this cause?

Mr. Holland: Now, if the Court please, on the same ground I mentioned before, I don't think that is a material [61] matter to this lawsuit.

The Court: The objection is sustained, it not be-

(Testimony of Richard T. Hawley.)

ing a material question to the witness apart from any matters in the pre-trial order.

Mr. Holland: Yes.

Q. (By Mr. Kane): Now, Mr. Hawley, what were your earnings in 1953?

A. 1953, I only—I worked an average of six months and twenty-eight days, Alaska Steam, forty-one hundred and some dollars.

Q. When did you first join the Alaska Steam in 1953? A. December 20, 1952.

Q. And you worked—

A. (Interposing) I worked steady for six months on the Nadina, then I got off of her and was ashore for 21 days, and then I shipped on the Square Sinnet.

The only company I worked for in the year 1953 was Alaska Steam.

Mr. Kane: I would like to have the wage voucher marked for identification, your Honor, as Plaintiff's exhibit 3, and the withholding statement for 1953 as plaintiff's exhibit 4.

The Clerk: Plaintiff's exhibits 3 and 4 marked for identification.

(Plaintiff's exhibits 3 and 4 [62] marked for identification.)

Q. (By Mr. Kane): I show you what has been marked for identification as plaintiff's exhibit 3, and ask you to tell the Court what those are?

A. Those are my pay vouchers for each voyage on the Alaska Steam.

Q. And those pay vouchers cover what period?

A. From December until June, December, 1953,

(Testimony of Richard T. Hawley.)

to June—on one ship, and on the last one from July to August.

Q. Now, what do you mean by “the last one”?

A. Well, the one I made out on the Square Sinnet. I only made one voyage on the Square Sinnet.

Q. And that terminated September 2, 1953?

A. That did, yes, sir.

Mr. Kane: All right, I will offer these.

Mr. Holland: No objection, your Honor.

The Court: Plaintiff’s exhibit 3 for identification may be admitted.

(Plaintiff’s exhibit 3 received in evidence.)

Q. (By Mr. Kane): Showing you what has been marked for identification as plaintiff’s exhibit 4, I will ask you to tell the Court what that is.

A. That is my total earnings from Alaska Steam in 1953.

Q. What is the name of that exhibit?

A. That is withholding statement from Alaska Steam for earnings made during the year 1953.

Mr. Kane: No objection? I will offer that.

Mr. Holland: No objection, your Honor.

The Court: Plaintiff’s exhibit 4 for identification may be admitted.

(Plaintiff’s exhibit 4 received in evidence.)

Q. (By Mr. Kane): Now, will you describe to us any feelings you have had from your stomach, Mr. Hawley, and I would like to have you stand up and sort of show the jury just by touching your abdomen where you were struck, and what effects you have had from that, physical effects?

(Testimony of Richard T. Hawley.)

A. Well, I have an operation here, from about eight—seven inches long, and I have two layers of wire that run from up in here down to below there, and I have two layers of wire they put in there to cover up the hernia. When they operated on my stomach, they took a piece about two and one-half inches square out of the lining of my stomach, and I have in here that silver wire they put in for a brace.

Mr. Kane: I have no further questions. [64]

Cross Examination

Q. (By Mr. Holland): Mr. Hawley, in my opening statement to the jury, I compared roughly the hold in which you were working with this courtroom, and told the jury that if this were the hold, that the square up above where the light is would represent reasonably the opening where the hatch is, and I didn't intend it to be correct, as I mentioned, but is that comparison a fair comparison? A. That is a fair comparison, yes, sir.

Q. You talked about the coaming, now, and would that be the side of the small square?

A. That is what you set the hatch covers into.

Q. In other words, if they closed up the small opening across, they would set the covers in the coaming, and the coaming is the part that runs outside? A. Outside the lower part, yes.

Q. I see. And assuming that His Honor represents towards the back of the vessel, then at the

(Testimony of Richard T. Hawley.)

moment where you are in the witness box would be forward? A. That is right.

Q. And you would be in the forward wing?

A. Yes.

Q. And you would be under the coaming?

A. Under the coaming; yes, sir. [65]

Q. And Mr. Kane, your attorney, would be about in the middle of the square?

A. About in the middle of the square, yes.

Q. Now, you told us about this ladder that goes from the deck of the hold up to the edge of the coaming; is that where it goes?

A. It is inside the coaming, about one foot inside the edge of the coaming.

Q. Just back——

A. (Interposing): It is an escape hatch.

Q. It is back from the edge of the coaming a little bit?

A. As the ladder goes up, is it a free standing ladder that would go from the middle of the room up?

A. No, it is connected at the forward deck.

Q. I didn't mean alone, is it standing without anything around, but secured at the bottom and top?

A. Secured at the bottom and top. It is a straight up and down ladder.

Q. If the ladder were in this room, I could walk around it if there was no cargo?

A. If there was no cargo; yes, sir.

Q. Is that ladder in the middle of the ship, as far as [66] going from side to side?

(Testimony of Richard T. Hawley.)

A. Yes, it is in the center of the ship, on the forward side of the hold.

Q. Now, you told us, I believe, that you were standing towards the port side which would be in this direction. Again, that is the back, from the ladder?

A. Yes, sir.

Q. How far?

A. Three feet.

Q. Were you even with the ladder opposite you?

A. I was back against the salmon, even with the ladder, yes.

Q. How close did the salmon come up to the ladder?

A. Within one foot.

Q. Wasn't there any more space than one foot between the salmon and the ladder?

A. Between the salmon, there was no space at all, behind the ladder at all. The salmon was stacked right up flush with the ladder.

Q. Except for one foot, you have told us?

A. One foot in front, yes, in front of the ladder underneath the hatch coaming. They load up until it is within one tier of the center of the hatch in order to go to work and let anybody stand back underneath of the coaming during loading. [67]

Q. And if this rostrum here represents the foot of the ladder, then you are telling us that this whole forward end of the hatch was filled with salmon?

A. To the other square of the hatch.

Q. To the other square of the hatch up to the ladder?

A. That is right.

(Testimony of Richard T. Hawley.)

Q. And if I went to use the ladder, I would stand here?

A. You would have to stand on the forward end.

Q. You always do anyway, don't you? You face forward as you climb the ladder? A. Yes.

Q. Now, were you directly opposite the ladder to the port side?

A. I was even with the ladder on the port side about three feet.

Q. You are certain that there wasn't any room between the ladder and the salmon that was stacked forward of the ladder?

A. There was no room at all.

Q. How many tiers of salmon were forward of the ladder up in this end of the hold?

A. Three tiers, seven high.

Q. Do you remember when you gave the testimony in Mr. Kane's office in January of last year, about the answers, [68] Mr. Hawley, and the questions that you were asked? Do you remember that?

A. Yes.

Q. And Mr. Franklin, who was in my office, came up and asked you questions about it? Do you remember he asked you this question:

"How far forward did the tier of salmon run from where you were standing?

"You said how far forward?

"Yes.

"There was only three cases between where I was standing and the deep tank.

"Question: Three tiers?

(Testimony of Richard T. Hawley.)

“Answer: Three tiers.”

You remember that you told us that that day?

A. That is what it was, three tiers.

Q. And then he asked you:

“What was the space between the end of the tier and where you were standing?”

And you said, “About two cases of salmon.”

And he asked you, “How wide would that be?”

And you said, “About three feet to the edge of the hatch coaming.”

Is that right? A. That is right. [69]

Q. So that where you were standing was about three feet from the nearest tier of salmon?

A. I was standing against the salmon when the load was coming down.

Q. Do you deny that you said it would be around three feet to the tier?

A. To the edge of the hatch.

Q. We are talking now about the tiers up forward. How far from where you were standing to the tiers in the forward end?

A. There wasn't any space there. I was standing up flush against the cases of salmon.

Q. Let me ask you again:

“All right, what was the space between the end of the tier and where you were standing?”

“Answer: Well, about two cases of salmon.”

“Question: How wide would that be?”

“Answer: It would be around three feet to the edge of the hatch coaming.”

Do you deny you said that at that time?

(Testimony of Richard T. Hawley.)

A. I do not deny that I said that, but that question there pertains to the load of salmon coming into the hold.

Q. He asked you about how many tiers between. Three tiers, you told him.

A. There was three tiers, and he asked me how much further, according to his way of putting the question at that [70] time, how much further to the center of the hatch where the load was coming down, and I said "About two cases, about three feet."

Q. His question was:

"How many tiers forward?"

And your answer was:

"There was only three cases between where I was standing and the deep tank.

"Question: Three tiers?"

"Answer: There was three tiers, yes.

"Question: All right, what was the space between the end of the tier and where you were standing?"

"Answer: Well, about two cases of salmon".

Do you remember being asked that? A. Yes.

Q. And two cases of salmon is about three feet, you say? A. That is right.

Q. Had you loaded salmon on any previous days?

A. Yes, we worked in two other ports.

Q. Had you done essentially the same type of work at the other ports in the same manner?

A. In the same manner, only in a larger hold.

(Testimony of Richard T. Hawley.)

Mr. Holland: Will you mark this, please? [71]

The Clerk: Defendant's exhibit 1 marked.

The Court: Is that A-1?

The Clerk: Defendant's exhibit A-1 marked.

(Defendant's exhibit A-1 marked for identification.)

Q. (By Mr. Holland): Mr. Hawley, handing you what has been marked Defendant's exhibit A-1, would you tell us what that is a picture of, as far as you can tell?

A. That is a picture of a swing board with a load of oranges on it.

Q. And will you tell us, is the bridle visible?

A. The bridle is visible, but that was not the kind of bridle on the pallet boards loading salmon.

Q. All right; how does this picture compare, if at all, with the set-up you had at that time, realizing, of course, instead of oranges, you were loading salmon cases?

What difference would there be as to the arrangement?

A. There was a different type of pallet board used.

Q. Is it larger, or smaller?

A. I would say it was about the same size pallet board. They run four and one-half or five feet, or six feet, some a little better.

Q. But there is a difference in size. Is that the only difference? [72]

A. There is a difference in the pallet board and the sling because on the pallet boards we were using,

(Testimony of Richard T. Hawley.)

there were four steel hooks, or eyes, on each end of the board where you use the hook to hook in.

Q. I see.

A. That is a regular skid load there.

Q. So that the difference between your board and this picture, which doesn't pretend to represent your situation, would be instead of the boards put under the skid, there were four eyes?

A. There were four eyes where the bridle hooked into the steel eyes on the corners.

Q. Is the same general arrangement there as far as the board itself, and the four legs going down, would they be the same?

A. The same generally, but not on the bottom there because they use a pipe, and they only hook it underneath the sling there. I will show you.

Mr. Kane: Your Honor, I am objecting to this line of questioning on the ground it is not proper cross-examination.

If counsel wants to make Mr. Hawley his witness, I have no objection.

The Court: I don't know if you identified the exhibit sufficient to show any purpose. I will sustain [73] objection on that.

Mr. Holland: I will offer Defendant's exhibit A-1 at this time, merely for illustrative purposes and subject to the changes Mr. Hawley mentioned.

Mr. Kane: I object to it, your Honor, on the ground——

The Court (Interposing): Objection sustained.

Mr. Kane: (Continuing) ——it is not a replica.

(Testimony of Richard T. Hawley.)

The Court: I will sustain the objection.

Q. (By Mr. Holland): Do you yourself have any pictures of the proper type of board, Mr. Hawley, and the salmon cases?

A. Yes, I have.

Q. You have some pictures?

A. No, I haven't.

Q. In the exhibit, Plaintiff's exhibit No. 1, you have shown the two lines coming down from above the deck, down to the load? A. Yes.

Q. Actually, at that point, there is a four-legged bridle?

A. Four-legged bridle under the load.

Q. I see.

A. The two lines coming down are into a big hook. They have a bridle with four hooks on it, leading from the large hook, and each one grips a hook, and you hook it into [74] the eyes on the board in order to raise the salmon, and when we come down, we take the hooks out of the eyes, and hold them until the winch driver swings them out of the way and nobody can get hit, and picks up another board.

Q. The two lines come together at a big metal circle, and then four separate lines go down to the board? A. Yes.

Q. And that is called a "bridle"?

A. That is called a bridle with four hooks on the bottom of each line.

Q. Do you know the identity of the three men

(Testimony of Richard T. Hawley.)

whom you described as cannery workers who were working with you?

A. No, I do not. At the time, we didn't do much——

Mr. Holland: If the Court please, I think the witness said "no", which was all that was called for.

A. (Continuing): No.

Q. (By Mr. Holland): Do you know where those men are today, Mr. Hawley?

A. I do not.

Q. And do you know for what cannery they were working at that time?

A. At that cannery there at Uganik.

Q. Uganik?

A. Uganik. It is an Indian name. Something like that.

Q. Is that the name of the cannery where they were [75] working?

A. That is the name of the cannery where we were loading, and they were working at the time.

Q. And that cannery is not operated by Alaska Steam that you know of?

A. I don't know that it is.

Q. When you were working down in this area, according to your Firemen's Union contract, you told us you received extra pay, is that true?

A. Yes, on overtime.

Q. Is that work that you must do, or is that work available to you under your contract?

A. It is available under the contract, and there is an agreement between the Firemen's Union and

(Testimony of Richard T. Hawley.)

Alaska Steam. They have a special agreement with Alaska Steam, and the Coastwise Lines.

The Alaska ships have different agreements than our off-shore agreements.

Q. Is that work you have to do if you don't want to?

A. It is not exactly compulsory, but any time you are a day worker aboard one of those ships, and do not assist, they will always find a reason why you don't work no more.

Q. But, in any event, it is not compulsory?

A. It is not compulsory at any time to work for anybody, as far as I know.

Q. At any time you were down there and you perhaps thought that any of the men working with you were not too experienced, you had a right, since it was not compulsory, to stop working?

A. You could stop any time you wanted to, but——

Q. (Interposing): That is all right.

Mr. Holland: May the witness be instructed to answer "yes" or "no"?

The Court: He may want to explain.

Mr. Holland: He wants to explain every question.

The Court: The question was answered now, but I suggest to the witness, if you wish to explain——

Q. (By Mr. Holland) (Continuing): Do you want to explain that answer, then?

A. You see——

(Testimony of Richard T. Hawley.)

The Court: (Interposing): You wish to make a further explanation?

The Witness: Yes, on that there.

A. (Continuing): Any day workers, or working in the engineroom, the first engineer turns them over to the mate to work cargo. According to the Firemen's agreement, we agreed to cover up any time there was no regular longshoremen available, that the Firemen's [77] Union assist the Sailors in helping to unload salmon. That is why the Alaska Steam has that contract, because a lot of canneries up there, they have not—they have no longshoremen at all, and a lot of times while up there, those canneries are going and they cannot get the cannery workers to help them. They have to rely on the black gang. If you go to work and load one of those Alaska ships steady for six months, and refuse to work cargo, you will be discharged and you will not be able to work for them very long.

Q. (By Mr. Holland): Did you make any complaints to anybody about the other men working with you prior to your accident?

A. I hadn't worked with them long enough.

Q. You worked one and one-half hours only?

A. I worked one and one-half hours only.

Q. How many loads did you handle in that period of time, would you say?

A. I would say about 25 loads.

Q. What were you doing right at the time you were struck? Were you standing idle waiting, or were you doing some work?

(Testimony of Richard T. Hawley.)

A. The slingload of salmon had already entered the hold, and was down within two or three feet of the deck where we were working and it was in a swinging motion, and I [78] reached out and grabbed ahold of the corner of the bridle I was supposed to get.

Q. You got ahold of the bridle?

A. I had ahold of the bridle at the time they swung the load.

Q. At the time they swung the load, it was standing in a fore and aft position, is that correct?

A. It was swinging all the way down in athwartship and I walked out and grabbed the bridle on the forward inboard side.

Q. Before it was turned, was it fore and aft, or across the ship?

A. Athwartship.

Mr. Kane: I suggest he has already answered.

The Court: He goes on. If he would confine his answers directly, it would simplify it.

A. (Continuing): 'thwartship.

Q. (By Mr. Holland): You said it was across the ship? A. Across the ship.

Q. Before the men started to turn it?

A. Yes, sir.

Q. And before they started to turn it, you got your hands on one of the corners; right?

A. Right. [79]

Q. And it then swung and hit you in the stomach at that time?

A. At that time, yes, sir.

(Testimony of Richard T. Hawley.)

Q. You knew from the fact your hands were on it that it was going towards you, didn't you?

A. Yes, sir.

Q. How quickly did it swing?

A. It was swinging quite fast, and the other men were all on the other side, pushing against it, and I couldn't get out of the way at all.

Q. How many pounds of cargo were aboard?

A. I would say around generally 34 to 40 cases of salmon, which runs about sixteen or seventeen hundred pounds, at least.

Q. Now, your body wasn't pinned between the board and the salmon, was it?

A. It was, after I got hit. They pushed me back in to the cases of salmon in the back.

Q. You are telling us where it pushed you. Were you pinned between the edge of that board and the salmon behind your back?

A. I was, after I got hit.

Q. Were you knocked against the salmon?

A. I was knocked against the salmon, and I grabbed ahold of the ladder to keep from falling.

Q. Were you pinned between the board and the salmon? Do you understand my question?

A. I understand.

Q. Were you pinned between the two?

A. I wasn't pinned; when it hit me, I let go of the bridle and grabbed the ladder.

Q. Then your answer is that you were knocked in? A. I was knocked in.

Q. What kind of a blow was it?

(Testimony of Richard T. Hawley.)

A. A real sharp blow.

Q. Would you call it a pushing blow?

A. No, more like a sharp push, or punch.

Q. Mr. Hawley, when you gave your testimony in Mr. Kane's office, last January, the question you were asked was, "What part of your body was pinned?" And your answer was, "It didn't pin me. Just hit below the belt, a sort of glancing blow, sort of a pushing blow. It knocked me against the cases of salmon."

Now, you say it was not a pushing blow?

Mr. Kane: Your Honor, he testified it was a pushing blow.

The Court: The question is whether he testified "yes" or "no"?

A. Yes, sir. [81]

Q. (By Mr. Holland): The answer is "yes", you did so testify? A. Yes.

Q. All right; as between the testimony a year ago, at which time you said a pushing blow, and your testimony today in which you say it was not a pushing blow, would you tell us which is the truth?

A. It was just like I said, it was a sharp, pushing blow.

Q. It was a pushing blow then?

A. A sharp, pushing blow.

Q. And you described it a year ago as a pushing blow? A. Yes.

Q. Can you describe how fast that 16 or 17 hundred pounds of cargo was swinging?

(Testimony of Richard T. Hawley.)

A. I couldn't estimate the speed. It was swinging pretty fast, because there were four men on the other side against me.

Q. How far back did it knock you back when it pushed you?

A. About one and one-half feet back.

Q. Where were you struck with reference to the navel?

A. Just below the navel.

Q. About how far below? [82]

A. About two inches.

Q. You were standing still at that time when you were hit opposite the ladder, were you?

A. Inside the ladder.

Q. Inside, meaning what?

A. To the port side.

Q. But even with it, across the ship, is what you mean?

A. Yes.

Q. And that is where you were standing when you were pushed or knocked back?

A. When I was knocked back against the cases of salmon, I reached out and grabbed the ladder to keep from falling.

Q. And if you were standing even with the ladder, what space was there in which you could be knocked back one foot, since you told us the salmon was stacked up to the ladder?

A. That is the only space you could have been knocked back in.

Q. Was the salmon stacked up to the back side of the ladder?

(Testimony of Richard T. Hawley.)

A. The salmon was stacked clean across the hold.

Q. Clean across the hold? A. Right. [83]

Q. And you were standing abreast of the ladder, opposite the ladder, is that right?

You told us that once; is that right?

A. Right.

Q. And you still say there was space for you to be knocked one and one-half feet back against the salmon? A. Up forward, I mean.

Q. Forward on the ship?

A. Forward to the ship.

Q. Was the load of salmon even or across the front of the ship, or even to the square of the hatch?

A. We filled in the forward side of the hold to the wall on each or both sides, and we were working in the wings and the forward corner at that time.

That is where we were swinging them, in past the cases of salmon we already loaded in order to get up in the forward corner of the hatch.

Q. All right, now I will ask you my question again:

Did the salmon as it was stowed present a straight wall across?

A. A straight wall across the square of the hatch, yes.

Q. And you still say you were knocked back some one and one-half feet when you were hit?

A. Yes, sir.

(Testimony of Richard T. Hawley.)

Q. Now, isn't it true that you were pushed by the [84] load just as it began to move?

That is, just as the board began to turn around?

A. The board was swinging as we grabbed ahold of it, and they pushed it.

Q. Is it true that you just began to turn the board when you got hit? A. Yes, sir.

Q. So that it was in the start of this quarter-turn that the men were trying to make?

A. Yes, sir.

Q. Therefore, the swing, or this quarter turn of the swing of the board had not been completed when you were hit, then, is that right?

A. Yes, sir.

Q. Did you know at the time why the direction of the swing was any different than you had been doing before?

A. I did not, not until after I was hit.

Q. Did you at any time after you were hit, find out why it was any different?

A. I did, right after the load was landed, and I talked to Mr. Perry about it and told him in the near future we would go ahead and watch and swing the loads clockwise.

Q. You are telling me what you told somebody. Did you ever find out why they turned it differently?

A. They didn't say. I told them to watch it in [85] the future.

Q. Is the answer to my question "yes" or "no"?

(Testimony of Richard T. Hawley.)

Did you ever find out why they turned it in a different direction? A. No, I did not.

Q. And is it true that you blame your accident on the three cannerymen who came from the shore?

Mr. Kane: I object to that, your Honor, on the ground the answer calls for a conclusion.

The Court: The question is: "Is it true?"

The question should be, do you blame them?

Mr. Holland: I will reframe the question.

Q. (By Mr. Holland): (Continuing) You blame your accident on the three cannery workers who were from the shore and who you say were inexperienced?

A. At the time, I didn't blame anybody for it.

Q. Now, we are in a lawsuit, and are those the three men you blame for it?

A. I would say their inexperience. That might have been some help to sustaining the injury I got.

Q. Then is your answer to the question "Yes"?

A. Yes.

Q. One thing, Mr. Hawley, on Plaintiff's Exhibit No. 1, I believe you attempted—but perhaps you were stopped, [86] even by me, to put in some further change that you observed on this diagram, because it didn't show the coaming? A. Yes.

Q. Is that right?

A. The square of the coaming.

Q. In other words, this deck should come out further? A. Yes.

Q. How far?

A. Even with the top one there.

(Testimony of Richard T. Hawley.)

Q. Even with the top one? A. Yes.

Mr. Holland: Should I draw that, Counsel?

Mr. Kane: Yes.

Q. (By Mr. Holland): A straight line, Mr. Hawley?

A. That would be the hatch coaming.

Q. How, like that?

A. Yes, and then down.

Q. And the same on the other?

A. Yes, and then down.

That is where your hatch coaming is.

Q. That is the point you get in underneath?

A. Yes, sir; underneath.

Q. Since you say you were pushed, or struck by the board at the very beginning of its swing, and since you had [87] your hands on it, tell us how quickly after it started to swing that you knew in what direction it was swinging?

A. I didn't know until it hit me.

Q. You couldn't feel it in your hands, that it was coming towards you?

A. On those cables there, there is quite a bit of slack, and sometimes when you grab ahold, and it is swinging, there is always a little give there.

Q. And there is slack in the cable even though it is 170 pounds?

A. I don't mean slack, but there is give there when you are pushing it around.

Q. How many inches would you estimate that the corner of the board had travelled from its first position until it hit you?

(Testimony of Richard T. Hawley.)

A. About ten inches.

Q. And during that period, there was so much slack or give——

A. (Interposing) When it hit me, it pushed me off balance.

Q. Now, I will ask you my question:

So, you tell us that there was so much slack or give in that cable that you couldn't feel it move towards you until the board itself travelled ten inches; is that what you are saying? [88]

A. That is my estimate.

Q. Is there any slack in the other three legs of the bridle holding the 1700 pounds?

A. I don't know what was on the other corners. I only had ahold of one corner.

Q. You think that a board supported by four cables could have ten inches slack?

A. I didn't say ten inches slack. I said it travelled ten inches before it hit me, but there wasn't that much slack.

Q. You are sure you had your hands on the cable?

A. I am sure I had my hands on the cable, yes, sir.

The Court: I think we might take a recess now, Mr. Holland.

Mr. Holland: Thank you, your Honor.

The Court: Ladies and Gentlemen of the Jury: We will now take the mid-afternoon recess. The Court calls your attention to the admonition given

(Testimony of Richard T. Hawley.)

you this morning, and asks that you heed it on this occasion.

You may now be excused.

(Whereupon, the jury retired from the court room.)

The Court: Court will recess for fifteen minutes.

(Whereupon, at 3:17 o'clock p.m. a recess was had in the within-entitled and numbered cause until 3:34 [89] o'clock p.m. January 7, 1955, at which time the following proceedings were had, to-wit:)

The Court: You may take the stand, if you wish, Mr. Hawley. You may call the jury.

We will recess about 4:30.

(Whereupon, the jury was returned to the courtroom.)

Mr. Holland: That is agreeable, your Honor.

The Court: You may be seated. You may proceed, Mr. Holland.

Mr. Holland: Yes, sir.

Q. (By Mr. Holland): Mr. Hawley, you told us that if you would wait back under the coaming for the cargo to come down, you would wait there until it got just off the deck and then step out to take ahold of it? A. Yes, sir.

Q. How far on this occasion did you step out to take ahold of it? A. About two feet.

Q. And when you stepped out—before you took those two steps, or that two-foot step—two-foot step—were you just opposite the ladder and then you stepped out into the square?

(Testimony of Richard T. Hawley.)

A. I was three feet inside the ladder, even with the ladder. [90]

Q. Even with the ladder going across the ship?

A. Yes.

Q. Was that before you stepped, or after?

A. Before I stepped out.

Q. And you stepped into this room into the square?

A. I stepped into the square to grab ahold of the bridle.

Q. About two feet? A. Right.

Q. This manhole that you described, would be just a hole in the ceiling that you would go through when you climb the ladder? A. Yes.

Q. And you told us it would be back from the edge of the coaming; how far?

A. About one foot or so to the after end of the hold.

Q. Yes, and the hole would be just big enough for a man?

A. Just big enough for a man to go through, yes.

Q. And the ladder itself would be one and one-half feet or more back from the coaming, in underneath the coaming?

A. About two feet, or better; about another foot or so.

Q. And when the cargo came down, then the lines that held it, on Plaintiff's Exhibit 1, were they right against [91] the coaming or a little aft of it?

A. A little aft of the coaming.

Q. How far?

(Testimony of Richard T. Hawley.)

A. The lines would be to the center of the board about, I would say, three feet.

Q. From the coaming?

A. Yes, but the board would have to pass within one foot of the coaming.

Q. I see, so that when you stepped out there from about two feet, from the position you were in just opposite the ladder, at that time when you put your hands on the cargo, you had about three and one-half feet between yourself and the salmon stowed in the forward end, didn't you?

A. About three feet, yes.

Q. You told us about one and one-half feet from——

A. (Interposing) And then one and one-half feet on the inside, because the bridle comes down in the center of the board.

Q. So that you had three feet between your back and the salmon? A. Right.

Q. And the board only moved ten inches before it hit you? A. Right.

Q. Why didn't you move back into that three-foot [92] space?

A. I couldn't let go, because I was off balance when the board hit me.

Q. How were you off balance?

A. When the board hit me, it knocked me off balance.

Q. You just said when the board hit you, it knocked you off balance? A. Yes.

(Testimony of Richard T. Hawley.)

Q. Before it hit you, why didn't you step back into that three-foot space?

A. There wasn't three feet, because when the corner started swinging, I got ahold of the bridle.

Q. When you stepped out to grab the bridle, you stepped about two feet, and then what did you do before you were hit?

A. I grabbed ahold of the bridle, and the load was swinging, and I got ahold to catch the swing on the load.

Q. Did you grab the bridle?

A. Yes, and then I stepped back with the——

Q. (Interposing) From the time you grabbed the bridle, until you were hit, you told us the corner of the load moved about ten inches before it hit you.

A. What?

Q. You told us the corner of the load moved about ten inches before it hit you. [93]

A. When it was pushed, yes, but the board was still swinging when we grabbed ahold of the bridle, when we grabbed ahold of the bridle on account of Perry was working on the after end, and it was only a little space from the drop-off; we would let the load swing with us and then step back with the bridle until we got the swing out of the load, and then turned it the way we wanted it to turn.

Q. Then back to my question, Mr. Hawley:

You told us when you stepped out to grab the load, you stepped out about two feet.

A. To grab the bridle.

Q. And before you stepped out, there was about

(Testimony of Richard T. Hawley.)

one and one-half feet between you and the salmon, is that correct? You told us that.

A. No, I was back against the salmon in order to go to work and step out that two feet.

In stepping out, I stand back against the cases of salmon, and underneath the hatch coaming in order to go to work and be in the clear.

Q. Were you opposite the ladder when you were hit, or were you after of the ladder out into the square?

A. When I reached out, I had to reach out from the ladder.

Q. About two feet?

A. About two feet.

Q. And then, immediately after that, you put your [94] hands on the load, and it moved ten inches, and hit you in the stomach——

A. (Interposing) I grabbed——

Q. (Continuing) ——is that correct, what I said?

A. Yes.

Q. That is my question.

A. Yes.

Q. Then, at the time you were hit in the stomach, there was about three feet behind your back, is that correct?

A. No. As I told you, in order to catch the swing of the load while the load is swinging, coming down, we grab the bridle and ride the bridle around, and step back a step or two, and kind of steady the load before we turn it.

Q. Did you step back a step or two this time?

A. I did, and while this load was—before it was wholly stopped, and then we steady it, the load,

(Testimony of Richard T. Hawley.)

and then we swing it clockwise, the way we want, and then we get the board even so that we can swing it underneath.

Q. After the load came down and was steady, before it was turned, how much distance between the load and the cases of salmon was there forward?
A. I didn't get that.

Q. How much distance between the load before you swing it, and the salmon that was stowed up forward; how much [95] distance?

A. Between the load and up forward?

Q. Yes.

A. I would say about four or five feet.

Q. Between the load and the salmon up forward, is that right? Is that what you mean?

A. You mean—now, which way do you mean, the cases of salmon were behind me.

Q. That is correct.

A. No, there was only three feet.

Q. Three feet then between the load and the salmon behind you?
A. That is right.

Q. Now, I want you to remember that, because I don't want to confuse you, nor do I want to be confused.

You say it was three feet between that load before it was swung, and the salmon stowed up behind your back?

Mr. Kane: I object to this line of questioning, Your Honor. It is in the nature of argument with the witness.

(Testimony of Richard T. Hawley.)

The Court: It is cross examination. You may proceed.

Mr. Kane: I don't think it has any relevancy.

The Court: I think it is quite relevant. You may [96] proceed.

Q. (By Mr. Holland): To rephrase my question:—well, I will go on.

You have now told us before the load was swung that there was three feet between the load and the salmon that was at your back?

A. At my back, yes.

Q. You told us awhile ago that the corner of the load moved ten inches before it hit you?

A. Yes.

Q. Why didn't you back up to the balance of two feet, ten inches, behind you before you were struck?

A. As I explained before, I stepped out to get this load which was three feet from the nearest case of salmon. With the swinging of the board, I had to take a step or two back to take the swing out of the load.

We had to take the swing out of the load as it was coming down, in order to give protection to the man on the after end, so that he wouldn't be knocked off into the hole, and when I stepped back a foot or two, we were getting the swing out of the load when they pushed in a counter-clockwise direction instead of clockwise.

Q. Then, as you were hit, you were stepping backwards at the time?

(Testimony of Richard T. Hawley.)

A. Stepping backwards at the time. [97]

Q. Why didn't you step back further?

A. I couldn't step back no further after the board hit me. It knocked me back.

Q. Why didn't you step back further before it hit you?

A. I would have got the full load right in my whole stomach.

Q. Why didn't you step back into the space alongside this case of salmon?

A. I would have got hit anyway, because I couldn't move left or right.

Q. It didn't pin you against the salmon?

A. It knocked me against it.

Q. It didn't pin you against the salmon?

A. But if I did, it would have pinned me, and maybe killed me.

Q. Did you let go of the bridle when you were hit?

A. I didn't let go until after I was hit, and then grabbed the ladder; but if I had let go of the bridle——

Q. (Interposing) I am not asking you that.

The Court: Just a moment. Let him finish.

Mr. Holland: All right.

A. (Continuing) If I stepped back, the whole load would have hit me and maybe killed me at that time. [98]

Q. (By Mr. Holland): Did the load ever hit the salmon? A. No, it did not.

Q. In computing the amount you say you have

(Testimony of Richard T. Hawley.)

lost in wages and board and room, have you figured in this eight dollar a day figure that you told us men are paid when they are ashore; did you figure that in for the ten months?

A. For the ten months, yes, sir.

Q. You figured that in. Did they ever pay you eight dollars a day during that ten months?

A. I was paid by Alaska Steam according to the maintenance and cure of the agreement between the shipowners, is what I was paid, \$1,008 by Alaska Steam for just the time that I was unfit for work, and an out-patient.

Q. But you included that figure?

A. I did.

I was coming to that, and I collected \$1,008.

Q. But still since you included it, is it your contention you should be paid twice?

A. No, I included it in with the stipulation that I have already been paid that. That will be taken out.

Q. All right; now, Mr. Hawley, your counsel asked you how much you lost that you figured as a result of this ten months disability, and you told us \$7,800 to \$8,000?

A. Right.

Q. And now you tell us that includes maintenance [99] which you have already been paid.

A. I have collected \$1,008.

Q. And from that figure, we should take——

A. (Interposing) \$1,008 off of that figure.

Q. All right; now, did you include in that figure

(Testimony of Richard T. Hawley.)

you gave us, the value of board and room while you were in the hospital?

A. That is included, yes, because I have to keep my room while I am ashore. I always keep my room when I come ashore, anyway.

Q. But in the hospital, you got free board and room? A. I still kept my room.

Q. In the hospital, you still kept—I mean, you got free board and room?

A. I got board and room in the hospital.

Q. And you received your full wages at the end of this voyage you were on, didn't you, even though you did no more work?

A. I did no more work, and was paid to September 2nd.

Q. Have you ever had any experience in handling cargo before? A. I have.

Q. When?

A. Over a period of twenty-five years.

Q. Have you ever handled cargo in the Alaska trade? [100] A. I have.

Q. How recently, other than this one time?

A. One year ago, one year before I was hurt.

Q. During this time you worked for Alaska Steam?

A. No, I did not. I worked for the Coastwise Line.

Q. Did you handle cargo on that occasion?

A. I handled cargo on that occasion, yes.

Q. Do you consider yourself an experienced cargo handler, or stevedore?

(Testimony of Richard T. Hawley.)

A. No, I don't.

Q. You do not? A. I do not.

Q. Do you feel then that you are capable of telling us whether or not somebody else is experienced and capable?

A. No, I wouldn't say for sure whether somebody is capable or not.

Q. Then, what do you—then, what you told us about the three cannery workers you didn't mean?

A. Oh, yes; I do. They were inexperienced and when they should have been on the load, they got on the wrong side of the load.

Q. Now, you told me less than a minute ago that you didn't think you were able to tell us whether somebody else was experienced or not.

The Court: This examination is becoming argumentative, [101] Counsel. I suggest you be cautious about that.

Do you wish to restate the question?

Mr. Holland: No.

Q. (By Mr. Holland): (Continuing) What did you tell us that you were on the Shooting Star, which was your last vessel?

A. Shooting Star, yes.

Q. What were you on that?

A. I made one trip as a wiper, and one trip as an oiler.

Q. And do you have your pay voucher from that vessel? A. I have.

Q. Do you have it with you?

A. I have, I think.

(Testimony of Richard T. Hawley.)

Q. May I see them?

Mr. Holland: Do you have any objection, Counsel, to having these placed in evidence?

Mr. Kane: No.

Mr. Holland: You stipulate then they are then the wage vouchers from the Shooting Star?

Mr. Kane: Yes.

Mr. Holland: Defendants' Exhibit 5.

The Clerk: Defendants' Exhibit A-3 marked for identification. [102]

(Defendant's Exhibit A-3 marked for identification.)

The Court: A-3 may be admitted.

Those are the vouchers from the Shooting Star?

(Defendant's Exhibit A-3 received in evidence.)

Mr. Holland: That is correct.

Q. (By Mr. Holland): (Continuing) Do you have your ticket into the hall for another job, Mr. Hawley? A. I beg pardon?

Q. Do you have your ticket in to the hall for another job? A. I have.

Q. When did you put that ticket in?

A. As soon as I got off the Shooting Star, I registered.

Q. Has that ticket been called since you came back? A. No, it has not.

I am No. 1 on the list now until February 5th; they have 90-day shipping cards now. I am No. 1 man on the list.

(Testimony of Richard T. Hawley.)

Q. Tell the jury what a 90-day card means in terms of getting a job?

A. In the Union Hall, we have what we call a competing system, and a man comes in off the ship; he goes into the [103] hall and registers and gets a card with the number on it, and the date that he registered, and that is good for 90 days, but you have to attend every union meeting, every first and third Thursdays, every month, in order to get your card stamped. You may be able to go out and at any time before the 90 days, you are liable to go out in five or six days. A job is put on the board in our hall, and it is open competition. When a job is called out on the hour, every man that wants that job, he puts his card in at the window and the man with the lowest number gets the job, regardless.

It is fair and above board, and nobody—and, if you don't want the first, or you haven't the papers to cover the job, that is on the board, then you do not throw your shipping card in; but, that shipping card, we had 30-day cards until shipping slowed down quite a bit, and we have 90-day cards now.

Now, then, a job comes up, and I want to go on a ship and go offshore, if I don't want to go in on a job I will hold back and maybe someone with a card behind me can throw in and get the job, but they called out on the hour, and every job that comes in is put on the board, and everybody can see it, and whoever wants it, they call it three times, and the man with the lowest number takes the job.

(Testimony of Richard T. Hawley.)

Q. What happened, Mr. Hawley, later that day when you dropped a case of salmon; how did that happen?

A. I got weak, all of a sudden, and when I lifted the salmon, it slipped right out of my hands. I couldn't hold onto it.

Q. Did it stagger you at all?

A. No, it just dropped out of my hands, and that is when I reported to Perry that my stomach felt funny, and we were putting these cases of salmon seven high.

Q. Is the weight on the bridle, which is the four wires which go down to the board, is the weight evenly divided when there is a load on the bridle?

A. It is.

Mr. Holland: No further questions.

Redirect Examination

Q. (By Mr. Kane): Now, on cross examination, Mr. Hawley, you were asked the question:

Do you blame the three men for your injury, these three cannery workers working there?

Will you explain that answer to us?

A. Not fully. I wouldn't blame it all to them, but in the short space of the work, the area we were working in, and all, one of those men should have been [105] on the same side of the board as I am, on the outboard bridle, and he neglected to go and take a chance on the other side that Perry was working.

There wasn't very much room to work in, and if

(Testimony of Richard T. Hawley.)

that board had of swung out, it might have knocked him in, and, as a safety precaution, we ask each man to grab a corner.

Q. Now, Mr. Hawley, how much education have you had? A. Sixth grade.

Mr. Kane: I have no further questions, Your Honor.

Mr. Holland: No further questions, Your Honor.

The Court: That is all, Mr. Hawley.

(Witness excused.)

Mr. Kane: At this time, I would like to offer in evidence, Your Honor, the reading of the deposition of Clarence H. Meyers.

The Court: Are you going to read it in? Do you wish to read the questions and answers with Mr. Holland, and take the stand, or what?

Mr. Kane: Do you want to go up? We can read them back and forth, and we won't have to change.

The Court: Is that agreeable with you, Mr. Holland?

Mr. Holland: Yes, Your Honor.

The Court: I will advise the jury that counsel, Mr. [106] Kane, counsel for the plaintiff, is now introducing the testimony of one Clarence H. Meyers.

Mr. Meyers is not present, and, therefore, this deposition, which was taken some time ago, is being put into the record.

A deposition goes into the record just in the same manner as the testimony of a witness who might be present to testify, and you are to give it the

same consideration as if the testimony were brought out by the witness in the courtroom.

You may proceed. [107]

DEPOSITION OF CLARENCE H. MEYERS

(Whereupon, the following deposition of Clarence H. Meyers was read, the questions being read by Mr. Kane and the answers by Mr. Holland:)

“Q. Would you state your full name, please?

“A. Clarence Henry Meyers.

“Q. What is your address?

“A. 7024 - 15th Northeast.

“Q. What is your occupation?

“A. Sailor.

“Q. What type papers do you have?

“A. AB.

“Q. Approximately how long have you been sailing?
“A. I started in 1917.

“Q. Have you sailed more or less continuously since then?

“A. Well, my last time sailing was since 1942. I have been sailing almost steady since then. Of course, you know what I mean by steady, off and on. You will be ashore three or four months at a time or five months sometimes.

“Q. Are you planning on catching a ship in the near future?
“A. Yes.

“Q. And you don't know whether or not you will be here when this case comes to trial?

(Deposition of Clarence H. Meyers.)

“A. No, I don’t know that. I am liable to go any time. [108] I could leave today.

“Q. Would you tell us whether or not you were aboard the Square Sinnet during the last year?

“A. Yes.

“Q. When was that?

“A. Well, I made two trips on her. I think I got on there in July.

“Q. When did you finally get off that ship, approximately?

“A. Well, approximately two months later. They tied her up. I took her to Lake Washington.

“Q. Could you tell us whether or not you were aboard the Square Sinnet on August 21, 1951?

“A. I was.

“Q. What did you do aboard the ship on that particular day?

“A. Well, we was loading salmon.

“Q. About what time that day did you start loading salmon?

“A. Well, I think we had worked all night and we went to eat because I am pretty sure we got off at noon, so we ate breakfast and come back to work. We are off an hour, you see.

“Q. That would get you back about what time?

“A. 7:00 in the morning. I think we had breakfast at 6:00 and came back at 7:00. [109]

“Q. Where were you loading the salmon at that time in the morning?

“A. The forward lower hold.

“Q. That would be what number?

(Deposition of Clarence H. Meyers.)

“A. Hatch No. 1.

“Q. How many men were working in that hold at the time? “A. Ten.

“Q. Were they divided into any type of groups?

“A. Yes, five on each side, port and starboard.

“Q. What were the duties of these men?

“A. To unload salmon stowed in the ship and unload it off the pallet boards.

“Q. Now, would you describe for us the approximate size of this pallet board?

“A. Well, I would say she was approximately six feet by five. I don't really know the size of the pallet board. It was pretty fair size, around 5½ or five feet or six.

“Q. Would you describe the pallet board when it is completely loaded?

“A. Well, I think you have about 34 cases on there. There is 30 then you seal them on top with four, I think. I think it is 34 cases.

“Q. Approximately how much do each of these cases weigh? “A. 50 pounds. [110]

“Q. Would you describe just the manner in which the pallet board loaded with salmon is lowered down and unloaded in the hold?

“A. Well, it is on your winch and it is taken over the square of the hatch and lowered down into the center of the hatch and when it gets down to where you want it why you push it into place so you don't have to carry the cases of salmon to stow them—as close as you can. You see, they was stowing at that time in the wings.

(Deposition of Clarence H. Meyers.)

“Q. Would you tell us whether or not anything unusual occurred that particular morning?

“A. Well, we had this accident.

“Mr. Franklin: I move the answer be stricken as not responsive.”

Mr. Holland: I will waive that. I read the answer. Line 25.

Mr. Kane: Yes.

“Q. Yes, would you tell us whether or not anything unusual happened, yes or no, first of all.

“A. Yes, something unusual happened.

“Q. What was that?

“A. Well, Hawley got hurt. He got struck with the corner of the pallet board.

“Q. Would you tell us how far along with the loading you were at the time Mr. Hawley was hurt?

“A. How far? [111]

“Q. Yes, how far had you progressed with the loading?

“A. Well we were in the lower hold. We had stowed forward of the escape ladder to go up and down or to come down on to work and we were stowing in the wings.

“Q. In which wing were you stowing?

“A. Starboard.

“Q. Do you know in which wing Mr. Hawley was stowing?

“A. He was on the port side. He was in the other group.

“Q. Now, would you describe for us what you saw at the time Mr. Hawley was hurt?

(Deposition of Clarence H. Meyers.)

“A. Well, the load came down. She came down in a sort of swinging manner and the fellows stepped out to steady her and turn her into position and Hawley was over by the ladder and got hit with the corner of it.

“Q. Where were you standing at this time?

“A. Well, I was over on the port side out of the way.

“Q. Did you have a clear and unobstructed view of what was going on over on the port side?

“A. Well, yes, there is nothing there but the load and the men.”

Mr. Holland: Well, I will waive the objection, your Honor.

“Hawley was up against the salmon and—the forward part beside the ladder and it looked like several of them had ahold of it. Of course, with something like that happening I am not—I am only particular to take care of [112] myself. The load was swinging and they grabbed ahold of it.

“Q. Would you tell us how the various men on the port side handled this particular load?

“A. Well, they come out trying to get ahold of it and they did get ahold of it.

“Q. Will you tell us where on the load the men were?

“A. Well, they get ahold any way to push it into position. You see, they could be on your lines coming down on your pallet board, if you grab it that way to pull it—either way, and the corner

(Deposition of Clarence H. Meyers.)

when it swung in—when it swung in the corner hit Hawley.

“Q. How many men had ahold of this pallet board at this particular time?

“A. Well, you see, I couldn’t see all of them. I could probably see three.

“Q. And where were they?

“A. Well, there was two out here in the open and Hawley on the inside.

“Q. Now, what were the two men out in the open doing?

“A. Well, I would say they was pulling—or pushing. Well, they could have been pushing or pulling to steady because this thing was swinging and they will pull—you know, that will pull you because that is 1,500 or 1,600 pounds and what you are trying to do is steady it and turn it around and push it into position. [113]

“Q. Then what were these men doing at that time?

“A. Well, now, I couldn’t possibly say whether they were pushing or pulling, but they were trying to place the board, get it steady and push it over, and then they holler to drop it, you know, get it in as far as you can so the men wouldn’t have to carry the salmon too far. You see, that is the idea of getting the board in there.

“Q. Can you describe for us the manner in which the load came down into the hold in relation to which way it was facing when it came down;

(Deposition of Clarence H. Meyers.)

in other words, did it come down fore and aft or athwartship or how?

“A. Well, I would say it was going athwartship, but it was like that, you see (indicating), and swinging back and forth like this, but I would say that the load had turned some way and I am not really positive of that. The only thing I can really say is that the corner hit him.

“Q. Will you tell us what happened after the corner hit Mr. Hawley?

“A. Well, when the load swung out I hollered to him, ‘Are you hurt?’ and he said, ‘No.’ Well, then I paid no more attention to it because when the load swung out I thought he was going to drop.

“Q. Did you at any time have an opportunity to observe Mr. Hawley’s physical condition then or immediately after? Just answer yes or no. [114]

“A. Well, I got off watch I guess it was around noon. I don’t know. I never did pay him any attention, never paid any more attention to it at that time because when I asked him I said, ‘Are you hurt?’ and I run over there and he said, ‘No,’ and, of course, he was rubbing his stomach sort of and he said, ‘No’ and that is the last thing I thought of that until a day or so later.

“Q. Would you tell us when, if ever, you first saw any effects, anything unusual on Mr. Hawley’s body after the accident?

“A. Well, I heard that evening that he went to bed and then I figured he might have got hurt a little bit at that, but I never gave it much thought

(Deposition of Clarence H. Meyers.)

until, oh, I guess it was—we left port and I come into the mess hall and this was early in the morning, and I think I was on the 12:00 to 4:00 watch, anyway. I am going to the wheel and I don't know what wheel watch I had, second or third. I know I didn't have the first, and I come into the mess hall to get coffee and he was getting there and I says to him, 'How do you feel?' and he lifted up—he just had a T-shirt on and he showed me his belly button and it was all full of blood.

"Q. When was this?

"A. Well, that could have been a day or two later. I don't really know. I know we was out to sea because I was going up to stand a wheel watch and it was after midnight. [115] I didn't have the first watch, and I presume I came back from lookout and from lookout I would go to the wheel and I came into the mess hall and he was sitting there.

"Q. Could you describe for us now just where Mr. Hawley was standing at the time he was struck?

"A. Well, he was just by the ladder and he was like that (indicating). This is the forward part of the ship and the ladder comes down here, you see, and he is over on this side of the ladder (indicating).

"Q. Which is port and starboard?"

Mr. Holland: That is objected to as not responsive, except for the first two sentences.

The Court: Well, it would appear that the first sentence is, and the second; and the balance would seem to be unresponsive.

(Deposition of Clarence H. Meyers.)

Mr. Kane: No objection.

Mr. Holland: The question was: "Which is port and starboard?"

"A. Port side. He was on the port side and he was on that side of the ladder."

Mr. Kane: "The Witness: I presume they tried to swing the board this way and it swung over this way and I seen that corner hit him."

Mr. Holland: What line now, Counsel? There is no question. [116]

The Court: I think that objection is stricken, and then——

Mr. Holland: (Interposing) Line 9.

Mr. Kane: Line 9.

Mr. Holland: I would say is the next question.

Mr. Kane: Your Honor, your ruling on the answer on line 4?

The Court: Yes, I think the objection is well taken. There was no question there, Mr. Kane. It continues to be unresponsive, it appears to me.

Mr. Kane: The question on line 9.

The Court: Yes.

Mr. Holland: Yes.

"Q. Could you just describe briefly where Mr. Hawley was standing at the time he was struck?"

Mr. Holland: In line 17, the witness says:

"Well, there is an artist's conception.

"Q. Now, Mr. Meyers, giving you the diagram that you have prepared of the ship, and of the No. 1 hold, could you point out where Mr. Hawley

(Deposition of Clarence H. Meyers.)

was standing at the time you observed him struck by the load?

“A. Well, now, what do I do, point?”

The Court: Do you want to use this diagram, or not?

Mr. Kane: Yes, Your Honor, I would like to.

The Court: Do you have one there?

Mr. Holland: I have a copy, yes, sir.

The Court: I don't know whether it serves any purpose or not.

Mr. Holland: Reading the deposition, line 24, it says:

“Mr. Meyers indicates with a dot.” And that is self-explanatory.

The Court: The diagram is in evidence?

Mr. Holland: Counsel says he wants to put it in now.

Mr. Kane: Yes.

The Court: This is the original here that I have, I believe.

Mr. Holland: That is correct.

The Court: We can just pull it out. Is that all right?

Mr. Kane: Yes, sir.

The Court: You can just tear it out. You have seen it?

Mr. Holland: Yes, I have, Your Honor.

The Court: And you have no objection?

Mr. Holland: No objection, Your Honor.

The Court: The plaintiff's exhibit No.—

(Deposition of Clarence H. Meyers.)

The Clerk: (Interposing) Plaintiff's Exhibit No. 5 marked for identification. [118]

(Plaintiff's Exhibit No. 5 marked for identification and received in evidence.)

"Q. Would you identify the spot on the diagram where Mr. Hawley was standing by writing in the letter 'H' in front of it? "A. Yes."

The Court: The record will show that the exhibit referred to as Plaintiff's Exhibit No. 1 in the deposition in the trial is Plaintiff's Exhibit No. 5.

Mr. Kane: Yes, Your Honor.

"Cross Examination

"By Mr. Franklin."

"Q. Mr. Meyers, would you put a dot with the letter 'M' where you were standing on Plaintiff's Exhibit No. 1?

"A. This is the hatch. Naturally, I am under the hatch coaming so I don't get hurt. I must have been in here someplace (indicating).

"Q. Just put the letter 'M' there.

"A. That is me.

"Q. How far would you estimate you were standing from Mr. Hawley at the time, your best judgment? "A. Oh, 20 feet, maybe 25.

"Q. Who was working with you if you remember, Mr. Meyers?

"A. Well, the only one I know that was working with me was my watch partner, Perry. [119]

"Q. Mr. Perry was on your side, was he?

(Deposition of Clarence H. Meyers.)

“A. Yes. I don’t know who the rest of them working there were.

“Q. Four of you?

“A. There was five of us on that side—on each side, but Perry was my watch partner. Him and I were together; that is, on the one watch.

“Q. And he was on the starboard side?

“A. He was on the starboard side with me.

“Q. The other three members, were they natives or members of the black gang or stewards department, or do you know?

“A. Well, they could have been from shore or from the black gang. You see, when we work a ship they keep constantly changing. The only ones on there are the sailors that are regular.

“Q. Mr. Meyers, how far is that escape hatch from the square there?

“A. It is right next to it.

“Q. That is the method you climbed down?

“A. That is where you climbed down and up.

“Q. And at the time you were stowing salmon in both port and starboard wings?

“A. Yes, sir.

“Q. Was there anything unusual about the method in [120] which this particular load of salmon that struck Mr. Hawley was being lowered?

“A. Well, it was swinging.

“Q. Well, isn’t that quite a common occurrence?

“A. Oh, yes. That is a common occurrence for loads to swing.

(Deposition of Clarence H. Meyers.)

“Q. Was there a good winch driver handling the loads? “A. Yes.

“Q. What was his name, do you remember? I think I have it here—George Burnett?

“A. Yes, that’s right.

“Q. At the time this load was swinging did Mr. Hawley have ahold of it?

“A. Yes, I would say that the grabbed ahold of it.

“Q. He grabbed the bridle?

“A. Yes, I think he was on the bridle. I am pretty sure he was.

“Q. Which way was he pulling the load?

“A. Well, I don’t know whether he was pushing or pulling, but I know he had ahold of it in some way.

“Q. How many other men should there normally have been on that load, four?

“A. Well, the whole five of them could have been on there.

“Q. You just saw two of them? [121]

“A. I say the load is approximately this high and there could have been two behind and two out in the open there and then him.

“Q. How high was the load off the deck when you were pushing it, or when they were pushing it?

“A. Well, probably that high (indicating.)

“Q. Three feet? “A. Yes.

“Q. And how high? You said there were 34 cases of salmon or something like that stowed on the pallet boards? “A. Yes.

(Deposition of Clarence H. Meyers.)

“Q. Are they tiered—how many tiers were there?

“A. That would be three up and then four on top of that. You see, that is to seal your load.

“Q. How high would that be from the pallet board? How high did the load extend or how high was it to the top of the salmon on the pallet board?

“A. I would say $3\frac{1}{2}$ or four feet.

“Q. So, of course, your vision would be obscured?

“A. On the outside—the inside. That would be the outside for me. Now, whether I seen four, but I am pretty positive I seen three because I seen two on this side and Hawley.

“Q. You had supper at 7:00 or 6:00 o'clock?

“A. Had what? [122]

“Q. Pardon me. Did you have breakfast at 6:00 o'clock in the morning on the day of this accident?

“A. Yes, I am pretty sure it was 6:00 to 7:00. We started to work at 7:00.

“Q. Then when you started working at 7:00 did you start loading salmon in the wings? Had it all been filled up forward?

“A. That I can't answer. I know we was stowing in the wings at the time.

“Q. Well, of course, you just caught a momentary glimpse of what happened?”

Mr. Holland: The last sentence in the next answer is objected to as not responsive.

Mr. Kane: I have no objection to deleting that part.

(Deposition of Clarence H. Meyers.)

The Court: All right.

“A. Naturally. I wasn’t looking for anything.

“Q. And after the accident Mr. Hawley continued to work for the balance of the morning?

“A. Well, he continued to work, yes—how long, I don’t know.

“Q. Did you observe anything unusual in the manner of his working?

“A. No. I really didn’t pay any attention to it.

“Q. Now, I believe you told us Mr. Meyers that the usual operation is that the winch driver lowers the load, [123] the pallet board with the salmon on it about three feet off the deck, roughly?

“A. Well, yes, from that up to where you are touching the bottom of the board.

“Q. Then he holds it—the winch driver holds it there for a minute?

“A. Yes. Well, he would lower it down I say to approximately three feet and that could be $2\frac{1}{2}$ or two feet so you can push your board into place.

“Q. And this particular load had been lowered down and you think it was in sort of a ’thwartship position?

“A. Yes. It was swinging this way and twisting and swinging back and forth.

“Q. And the function of the five men after the winch driver had lowered it to about three feet is to push it or twist it and push it in the direction where they want it located? “A. Yes.

“Q. And when they do that someone signals?

“A. Signals and says, ‘Drop it.’

(Deposition of Clarence H. Meyers.)

“Q. And that was the operation that was being conducted and is always conducted with a load of salmon? “A. Yes.

“Mr. Franklin: That is all.”

The Court: Do you have another one, Mr. Kane?

Mr. Kane: Yes, sir. Mr. Joseph Perry.

Mr. Holland: The other one, is it? We wouldn't be able to finish it. If you wanted to keep——

The Court: (Interposing) It wouldn't take more than fifteen or twenty minutes. What other testimony do you have?

Mr. Kane: Actually, we can postpone this. It will take fifteen or twenty minutes. The medical will be finished by Tuesday noon, so that it wouldn't make any difference, if we continued, if it is agreeable to the Court.

The Court: Mr. Anderson, how do you feel? I understand you had a cold?

Juror Number Nine: I feel fine. A little rough at the start.

The Court: I think we can get this, and finish up the depositions, as long as we are on it. [125]

(Whereupon the deposition of Raymond Joseph Perry was read, the questions being read by Mr. Kane and the answers by Mr. Holland:)

“RAYMOND JOSEPH PERRY

called as a witness at the instance of the plaintiff, having been first duly sworn by the Notary, was examined and testified as follows:

(Deposition of Raymond Joseph Perry.)

“Direct Examination

“By Mr. Spellman:

“Q. State your full name, please.

“A. Raymond Joseph Perry.

“Q. What is your address, Mr. Perry?

“A. 866 Corwin Place.

“Q. Is that in Seattle? “A. Seattle.

“Q. What is your occupation?

“A. Seaman.

“Q. About how long have you been sailing?

“A. Oh, 26 years, approximately.

“Q. What papers do you have, Mr. Perry?

“A. ‘A.B.’ as well as Second Mate, Ocean.

“Q. Are you currently on a ship?

“A. Yes, I am.

“Q. What ship is that?

“A. Iliamma, Alaska Steam. [126]

“Q. When is that ship sailing?

“A. Tomorrow.

“Q. Do you know whether or not you will be here on January 6 or any time during that week or so? “A. I don’t think so.

“Q. You intend to remain aboard the Iliamma, then? “A. Yes, sir.

“Q. Were you a member of the crew of the Square Sinnet on August 21, 1953?

“A. I was.

“Q. In what capacity did you serve on that ship? “A. ‘A.B.’ seaman.

“Q. Do you remember where you were working

(Deposition of Raymond Joseph Perry.)

on the morning of August 21, 1953—what part of the vessel?

“A. I know where I was working; but when you say the date, now, I would have to take everybody’s word for that was the date of the accident.

“Q. Where was the ship, at that time?

“A. It was at Uganik and we were loading salmon.

“Q. How many people were working, about?

“A. In the hold where I was working, five men on each side; that would be ten men.

“Q. What hold was that?

“A. Number one.

“Q. About what time did you start working the number one [127] hold that morning?

“A. I think we started at 7:00. That is the usual time. I don’t remember anything unusual about the starting.

“Q. Which side of the hold did you work on?

“A. On the port side.

“Q. Do you remember what side Mr. Hawley was working on?

“A. He was working on that side with me.

“Q. Do you recall anything unusual happening to Mr. Hawley on that morning?”

Mr. Holland: The following answer, Your Honor, is objected to as hearsay.

The Court: Was there an objection made?

Mr. Holland: No objection, it would be reserved, Your Honor, in this case.

(Deposition of Raymond Joseph Perry.)

The Court: I think it should be sustained as to what was said. Do you agree, Mr. Kane?

Mr. Kane: Yes, Your Honor.

The Court: Now, a portion of that answer is not, is that correct?

Mr. Holland: The second sentence would not be, that is correct. I will read that, then.

The Court: Yes.

“A. Of course, me being on the other side of the board and the load being between Mr. Hawley and myself, I [128] didn’t actually see it hit him in the stomach.

“Q. Could you tell us where in that particular hold Mr. Hawley was standing, at the time?

“A. He was standing forward of me. We had completed loading the forward part of that hold, up to the ladder, and were then working in the wings. He was working in the part close to that forepart that we had finished, but more the wings; where I was working the after part of the wing. I don’t know if that is clear or not, but——

“Q. Could you tell us where he was in relation to the ladder?

“A. Right within a few feet of the ladder.

“Q. On which side would that be?

“A. On which side in relation to me?

“Q. No. On which side—port or starboard?

“A. Port side.

“Q. Do you remember how many men were on the pallet board at the time Mr. Hawley was injured?

(Deposition of Raymond Joseph Perry.)

"A. It seems to me we had five on a side that morning. We never work with less than four on a side. But there were extra cannery workers working with this, as well as Mr. Hawley.

"Q. By 'a side', what do you mean?

"A. On the port side.

"Q. Do you recall how many men were on the side of the pallet board on which you were standing, at that time? [129]

"A. I believe I was on that side by myself. You see, there is a sheer drop-off, there, of about 20 feet by the bulkhead. It isn't safe for too many men to be on the side I was on. I believe the rest of the men were on the other side or in back of it in such a way as not to get shoved on that side. That is a sheer drop-off by the bulkhead, there.

"Q. Do you recall on which side Mr. Hawley was?

"A. He was on the forward side from me. I am on the after side, where this is straight up by the bulkhead. He was on the forward part. The board is between Mr. Hawley and myself.

"Q. Assuming that this board has two ends as well as two sides, were you on the end or the side?

"Mr. Franklin: At what time are we referring?

"Mr. Spellman: I am speaking of the board.

"Mr. Franklin: At the time of Mr. Hawley's accident or some other time?

"Mr. Spellman: At the time of his accident in particular.

(Deposition of Raymond Joseph Perry.)

“A. What was the question now?

“Q. At the time when Mr. Hawley was injured, were you on what would be called the sides of the board or on either end of the board?

“A. I would be on the end of the board. The board would come down—as it was coming in ‘thwartships, I would grab [130] hold of one corner, on the end, and swing it either that way or the other way, whichever way we were swinging, at that time—in order to make the board come fore and aft. The other men would grab the other end and do likewise and then we would come over in the wing with it.

“Q. Where was Mr. Hawley standing in relation to you, at the time of his injury?

“A. He was forward of me.

“Q. Would he be on an end or on the side of the board?

“A. I assume he grabbed one of the corners to help swing it, although like I say, there was the load between me and the other fellows. Somebody was grabbing the other end because it wouldn’t turn by itself, and I couldn’t do it alone.

“Q. Do you remember where the other men were?

“A. I couldn’t place them exactly as to spots.

“Q. Could you tell us whether or not there were any other men on the end with Mr. Hawley?

“A. Yes. There were five of us there. It couldn’t be all four of them grabbing hold of it; but there were at least two men with Mr. Hawley on that

(Deposition of Raymond Joseph Perry.)

corner, there. I assume one or two of the others stood back out of the way. There is a limit as to how much room you have there.

“Q. So there would only be two, actually, on the board there? [131]

“A. There was a limit as to how much space you have there.

“Q. There were five men working the board?

“A. There normally were. They never work less than four. They get as many more as they can get when the help is available.

“Q. When did you first know anything about Mr. Hawley's injury?

“A. When he mentioned that we were swinging the board too fast and it hit him. I can't give you the exact time on that. It was some time—maybe 9:00 o'clock or 8:00 o'clock—whatever time it was. I would have thought nothing of it because those things happen so often, if it had not been for him—I believe around 11:30 he said his stomach hurt, and he rode the board up.

“Q. How did you get out of the hatch?

“A. He went up on the lift board—the cargo board.

“Q. At that time, what, if anything, did Mr. Hawley say to you?

“A. He said his stomach hurt him; that he was going to go up. He told me that because I was the only sailor on that side, and we try to keep the number of men even on each side. Otherwise, he probably wouldn't even have mentioned it to me.

(Deposition of Raymond Joseph Perry.)

“Q. Do you know whether or not he worked with you during [132] the rest of the day?

“A. I know he didn’t work any more that day.

“Q. When, if ever, did you learn more about Mr. Hawley’s injury?”

Mr. Holland: I will waive the objection.

“A. Well, that evening I just heard the conversation about the ship,—that he had been hurt in the loading in the hold. Next day,—I believe it was the next day, if not late that night,—I think it was the next day, when he came in the mess room, there was some discussion there about how bad he was hurt, between him and I, the winch driver and some others. He pulled his shirt up. He had one of them loud striped polo shirts. He pulled it up. He has a pretty good sized stomach. A little trickle of blood I could see coming down from right at the navel. It looked to me and I said so at the time, that it was a ruptured navel. But I am no medical authority. I don’t know if that is what it actually was.

“Q. Mr. Perry, when, if ever, did you first see any unusual physical condition in regard to Mr. Hawley, after the accident?

“A. That was the next morning, when he showed us his stomach.”

Mr. Holland: The balance of that answer is objected to as not responsive. [133]

The Court: I think that is correct.

Mr. Kane: Line 9; line 6, pardon me.

“Q. Would you tell us what you saw?

(Deposition of Raymond Joseph Perry.)

“A. His stomach was puffed out. Whether that was a normal condition with him or not, I don’t know. He is quite a big eater.

“Q. Will you describe what you saw?

“A. A trickle of blood coming down from his navel.

“Q. Do you know whether or not Mr. Hawley worked during the rest of the voyage?

“A. I would say that he didn’t, but I wasn’t keeping no tabs on him; but I saw him around in the evening a bit.

“Q. Can you tell us what the duties of a hatch tender are, Mr. Perry?

“A. A hatch tender is used principally when the winch driver cannot see the dock. Therefore, he gives the signals for the winch driver to come back with the hooks; he stops the hooks; we put the load on, and then he gives the signal to come ahead. But that wouldn’t pertain to this case because the winch driver could see the board land in the hold. It didn’t happen on the dock. I don’t think that the hatch tender would have any bearing on this case.”

The Court: Do you waive your objection?

(No response.)

“Q. Do you know whether or not there was a hatch [134] tender on duty that day, at that time, when Mr. Hawley was injured?

“A. There was supposed to be one there. Let’s see, number one hatch—By Golly! That winch driver could never have seen that dock. There

(Deposition of Raymond Joseph Perry.)

must have been one there because that is up high. Of course, it was facing into the tide where he could see it, but there is supposed to be one there at all times whether he can see it or not. There is still supposed to be one. But I am down in the hold and if the man isn't there, I don't know it.

"Mr. Spellman: No further questions.

"Cross Examination

"By Mr. Franklin:

"Q. Mr. Perry, who was the winch driver?

"A. George Bornett.

"Q. Is he a competent winch driver?

"A. I have known George since before the war—I would say for fifteen years or so—and he has always been a winch driver. I have never heard any complaints about his driving.

"Q. At what time of the day did you first learn of Mr. Hawley's injury?

"A. The time I would guess would be around 9:00 o'clock that morning when he mentioned that he was hit by the swinging of the board. [135]

"Q. At the time he mentioned it to you, were you waiting for another load to come in?

"A. No. We had swung this load in,—and I can't tell you the exact words now about being 'too rough with the swinging' or that 'it hit me' or some words.

"Q. You don't know anything about his injury except what Mr. Hawley told you—that he had been injured? "A. That is right.

(Deposition of Raymond Joseph Perry.)

“Q. Did he tell you, right after the load had been put into position,—did he tell you right after the load struck him that he had been hurt or was it some time afterwards?

“A. I think it was right afterwards.

“Q. This particular load had been landed down in the lower hold in the usual manner, had it?

“A. Yes, it had.

“Q. And the winch driver lowers the load of salmon down to within a few feet off the deck, does he? “A. Yes; so we can get ahold of it.

“Q. There were five men to the port side, to your recollection? “A. Yes.

“Q. Each one has hold of a tag line, do they?

“A. We actually grab the bridle. It has hooks on it.

“Q. When this load was landed, first of all somebody signals the winch driver to stop, don't they, when it is [136] a few feet off the deck?

“A. Yes, if that is necessary. But if he can see—which he can in most cases—then he does it himself. It is better than having someone signal.

“Q. Do you remember, Mr. Perry—and if you don't remember, just say that you don't.

“A. Yes.

“Q. Do you remember how this particular load came down; was it facing in a fore and aft or a 'thwartships position?

“A. That particular load—as well as loads before that and afterwards—were coming in 'thwart-

(Deposition of Raymond Joseph Perry.)

ships. We had to turn them in order to swing them in the wings.

“Q. Were they landed near where you were standing—near where you and the other men were standing? “A. Oh, yes.

“Q. If it was in a 'thwartships position, that means extending across the deck, does it?

“A. That means—if this was the length of the ship that would be across the deck (indicating with hands).

“Q. The men would immediately get on each end of it, would they?

“A. They would grab hold of a corner and turn it; and then we give it a little swing to come under the coaming a little.

“Q. Where were you going to land this particular load? [137]

“A. A little under the coaming on the port side.

“Q. Did you want to land it in a fore and aft position? “A. Yes.

“Q. So the load, before you started this movement, was in a 'thwartships position and you wanted to move it into a fore and aft position, did you?

“A. Yes.

“Q. At that time, when you started in, Mr. Hawley was standing near the ladder on the in-board side of the pallet board, was he?

“A. He was standing forward of the pallet board.

“Q. He was standing forward of the pallet

(Deposition of Raymond Joseph Perry.)

board and near the ladder,—the escape hatch, was he?

“A. Well, there are four men there. Like I say, I couldn’t place those four men. But I do know that he was forward of me because of the danger of this here sheer drop-off, which I was the only one over on that side.

“Q. When you first started out, if there were five men, there would probably be two men on the forward end, two on the aft end and maybe one on the outboard end, would there?

“A. It would be an uneven number of men. Most of the men would be forward. It is hard to say just how many grabbed hold of it.

“Q. How far were you going to swing it,—how many feet? [138]

“A. Well, first of all, we have to turn it. You just don’t turn it and swing it at the same time.

“Q. The first thing you did was turn it so it was fore and aft? “A. Yes.

“Q. Then having turned it fore and aft, what did you do?

“A. We get hold of it and give it a little swing. Maybe the odd man would just push on the salmon cases, themselves,—and we would give it a little swing into the wing and as it came over the winch driver would set it down.

“Q. You say ‘swinging into the wing’?

“A. Yes.

“Q. That would be inboard, would it?

“A. Inboard, yes,—towards the dock.

(Deposition of Raymond Joseph Perry.)

“Q. Well, that would be outboard if it was towards the dock, would it not?

A. Well, we are working the wings. We swung it into the port side,—swung it to the port side.

“Q. So that the first thing you did, you changed the position or heading from 'thwartships to fore and aft, is that right? “A. Yes.

“Q. And then you shoved it out towards the skin of the ship? [139] “A. That is right.

“Q. About how far?

“A. Oh, not far. The winch driver first of all brings it over as far as he can bring it. Then we can gain another two or three feet by hanging on to it and pushing it.

“Q. Then when you have it in the position you want, you call up to the winch driver to drop it, do you? “A. Oh, he sees that.

“Q. He sees that?

“A. Yes, he sees that.

“Q. He does it automatically?

“A. He does it automatically.

“Q. Was there anything about this particular load that Mr. Hawley claims he was injured on that was different or that was done in any different fashion than you had handled the previous loads or any of the subsequent loads?

“A. Not that I know of, no—unless we were rougher than usual. But, Gee! With thousands of loads of salmon, I can't—

“Q. Do you recall, yourself, being rougher on that particular load than on any other load?

(Deposition of Raymond Joseph Perry.)

"A. Of course, we were working in an unusual position. You don't generally have a sheer drop-off behind you.

"Q. My question was do you recall being any rougher on that particular load than you were on any other load that [140] particular load than you were on any other load that you handled that morning? "A. No; I can't say.

"Q. Do you recall any other men being any rougher on this load than Mr. Hawley says he was injured on, than any of the other loads?

"A. Well, he could have, but I don't know.

"Q. You don't know. As a matter of fact, you didn't know that Mr. Hawley was hurt, did you, until he told you? "A. No, I didn't.

"Q. How far away from the ladder was he when he was struck?

"A. I could estimate,—say three or four or five feet; but that is just an estimate.

"Q. Two other men were there who were right in the general vicinity of where Mr. Hawley was, were they? "A. Yes.

"Q. Did they make any complaint to you that he had been injured?

"A. No. But apparently Mr. Hawley attempted to grab hold of the corner when it swung, I assume that is how it hit him.

"Q. Of course, all of you men work as a team, don't you, Mr. Perry? "A. Oh, yes. [141]

"Q. And you have to be aware,—you have to realize that the load is going to be swung?

(Deposition of Raymond Joseph Perry.)

“A. Yes; under those conditions, there, where we were loading.

“Q. So you have to sort of keep your eyes and your ears open when that work is being done, don’t you?

“A. Oh, yes; that is part of the job.

“Mr. Franklin: I think that is all. Thank you.

“Redirect Examination

“By Mr. Spellman:

“Q. Mr. Perry, do you remember—after this came down into the hold—in which direction you swung it; in other words, would that be clockwise or counter-clockwise?

“A. That is an awful hard thing for me to tell, at this time. I wouldn’t want to say it was one way and have someone else say it was another way. I don’t see where that is material because either corner could hit him just as well, whether it went one way or the other. There is a corner, there, and it is coming around.

“Q. I was wondering when you would swing it, whether or not you would swing it in a different direction when you were loading in one part of the hold, there, than you would swing it if you were loading it in another part of the hold, for instance.

“A. We usually get into a routine. If we are swinging [142] to the right we generally swing to the right, until we move to another spot. In other words, we can’t have half the men pulling one way and half pulling the other way.

(Deposition of Raymond Joseph Perry.)

“Q. Do you recall how long you had been loading in this particular spot?

“A. Let me see,—oh, it must have been a couple of hours, I guess.

“Q. In what spot would that be, now?

“A. That would be landing them in the same place, in order to load them into the wing, since we had the forepart already loaded.

“Q. Do you recall how many men actually were pushing or pulling on the board at the time Mr. Hawley was injured?

“A. I wasn’t in a position to see all of the men; in fact, I wouldn’t even look. There would be some fellows who would lay back—maybe they would be pushing and maybe they wouldn’t be.

“Q. So you don’t know how many fellows were pushing? “A. No, I don’t.

“Mr. Spellman: I have no further questions.

“Further Cross Examination

“By Mr. Franklin:

“Q. After this discussion you had with Mr. Hawley, Mr. Perry, you continued handling salmon in that particular location, for a couple of hours, didn’t you? [143] “A. Oh, yes.

“Q. And you did it in the same way you always did?

“A. We didn’t make any changes that I know of until we filled that up and had to come out.

“Q. Nobody else had been hurt at that particular time except Mr. Hawley?

(Deposition of Raymond Joseph Perry.)

“A. I don’t remember of any other accident. There could have been, but I don’t remember of any.”

The Court: That completes the deposition, and that is all we can accomplish today.

Ladies and Gentlemen of the Jury:

We will now recess until next Tuesday at ten o’clock. Be here a little before that.

The Court calls your attention to the admonition previously given. You will be away now, over Saturday, Sunday and Monday, and be cautious you do not discuss the matters with anyone on the outside, and be cautious you do not reach any conclusion as to any of the issues involved, until it is finally submitted to you for your verdict, and should there be any news items, as to this case, or a similar case, be cautious you do not read them until such time as you discontinue your services in this case.

You will now be excused until Tuesday at ten o’clock, and be here about fifteen minutes early. You [144] will now be excused until Tuesday at ten o’clock, and be here about fifteen minutes early.

You will now be excused.

(Whereupon, the Jury retired from the courtroom.)

The Court: Do you have any requested instructions?

Mr. Holland: I have some, but I thought I would add to them. I could file them Monday, sometime.

The Court: Will you bring them up Monday morning, then?

Mr. Holland: I will do that, yes.

The Court: All right. This trial will be recessed until Tuesday morning, January 11th, at ten o'clock a.m. Court will recess until Monday morning at ten o'clock.

(Whereupon, at 4:41 o'clock p.m. January 7, 1955, hearing in the within-entitled and numbered cause was recessed until 10:00 o'clock a.m. January 11, 1955.) [145]

FRANK J. LEIBLY

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name, and spell your last name, please?

The Witness: Dr. Frank J. Leibly, L-e-i-b-l-y (spelling).

Q. (By Mr. Kane): Will you state your name, address and occupation, please?

A. Dr. Frank J. Leibly, Stimson Building, Seattle, and I am a physician.

Q. Do you know Richard T. Hawley, the plaintiff?

A. Yes, I examined Mr. Hawley yesterday.

Q. Now, Doctor, what was the result of your examination?

A. I will have to go back and review the his-

(Testimony of Frank J. Leibly.)

tory to get the proper sequence of events that transpired.

He was injured aboard ship when he was struck in the abdomen by a case of salmon on the 21st of August, 1953.

Following this injury, which probably was of a [150] minor nature, which induced a break in the skin in the navel, he developed an infection of the navel. Granular tissue was excised September 9, 1953, at the Marine Hospital.

Unfortunately, he developed some sloughing of fatty tissue of the abdominal wall, and re-operated on October 8, 1953, at the Marine Hospital, and the infected tissue then removed.

He was treated in the out-patient department December 15, 1953, and finally admitted to the hospital and hot packs applied, and was operated on for a rectal hernia December 9, 1953, and discharged in January, 1954.

Unfortunately, infection continued and further fat necrosis occurred, and he was re-operated on in May, 1954, and at that time, the tissues were brought together with wire sutures.

Since May, 1954, he was treated for approximately one and one-half months in the out-patient department.

He was requested to report in to the Marine Hospital after each trip he made aboard the vessel, and on November 5th and 12th at the site of the incision, he developed small stitch abscesses, which were drained.

(Testimony of Frank J. Leibly.)

One abscess formed in December, and at the present time, this is practically healed, and there is still a scar, or a scab, in the upper portion of the incision.

Unfortunately, there is some deep seated infection [151] at the site of some of the wire sutures, and the probability is that some of the sutures will have to be removed to completely clear up the sinus tract.

Q. Doctor, have you had occasion to treat cases of this type of trauma before?

A. We all see a number of these cases where suture material becomes infected, and if the suture itself does not fluff out, it has to be removed to clear up the chronic infection.

Q. Have you had occasion to take x-rays of this?

A. Yes, I have had x-rays taken yesterday, and I believe this film shows it the best.

The radiologist counted 25 separate wire sutures in the abdomen wall.

Q. And those are the x-rays that were taken, Doctor?

A. Yes, yesterday in the Stimson Building.

Q. Now, Doctor, assume that the plaintiff in this case here was, prior to August 21st, a normal, well man when he was struck by this pallet board inflicting this trauma in his stomach, and subsequently removed to the hospital, and had frequent operations for an approximate period of about ten months; assuming these questions, these facts, Doctor, can you state with any reasonable certainty

(Testimony of Frank J. Leibly.)

in your opinion what was the cause, the probably cause of this infectious condition? [152]

A. As a result of the blow, I think one of two things, or probably both, may have happened.

Certainly, there must have been a small abrasion or a tear in the skin above the navel, and this later became infected, and, assuming from the extent of the blow there could have been deeper damage, interference with his blood supply, and so forth, so that it, therefore, was more susceptible to infection.

Q. Now, from your opinion, based on the examination of this patient, would you say that this disability is permanent?

Mr. Holland: Well, just a moment, if the Court please. I think that is assuming facts not in evidence, namely, that there is any disability.

The Court: The reporter will read the question.

(Whereupon, preceding question was read by the reporter.)

Q. (By Mr. Kane): (Continuing) That is from which the plaintiff is now suffering.

A. Well, it is permanent until remedied. Let's put it that way. That the basis of the infection at the present time probably originates from wire sutures which act as a foreign body and keep the infection active, and, until such time as the suture which is responsible, one or more, [153] for the infection is removed, the probability is there will be recurrent stitch abscesses because the wire suture will not be absorbed.

(Testimony of Frank J. Leibly.)

Mr. Kane: If there is no objection, I would like to offer the x-rays in evidence at this time.

Mr. Holland: I would like to question the doctor, if the Court please.

The Court: You may.

Mr. Kane: I have no further questions then at this time.

Mr. Holland: All right.

Cross Examination

Q. (By Mr. Holland): Then all the x-rays, Doctor, were they taken in your office?

A. No, they were not. They were taken by Dr. Homer V. Hartzell, radiologist.

Q. And did he give you—

A. (Interposing) I have his typed report here.

Mr. Holland: On the request for the x-rays, I think it would be competent if the Doctor who took, and also diagnosed and described the x-rays were called, rather than Dr. Leibly, who takes Dr. Hartzell's comments, and it is hearsay. [154]

The Court: If you object, the Court will sustain the objection.

Q. (By Mr. Holland): Doctor, is that the only time you have seen Mr. Hawley?

A. That is correct.

Q. Just yesterday?

A. That is correct.

Q. And did you, at any time, ever have an opportunity to examine the Public Health Service records at the Marine Hospital?

(Testimony of Frank J. Leibly.)

A. I examined the abstracts of his records, not the original records.

Q. Mr. Hawley brought them to you?

A. That is correct.

Q. Did the abstracts, Doctor, show any indication of a cysticorrhaphy that had been performed at the Marine Hospital?

A. It did, but that was not connected or associated with the condition that is under consideration at the moment.

Q. Will you tell me what I meant by a cysticorrhaphy?

A. It is an examination of the interior of the rectum through an instrument to visualize the wall, the lining, inside the rectum, and a small tumor was detected and removed. [155]

Q. A small what? A. A small tumor.

Q. Will you tell us whether that has any relationship to this?

A. As far as I can see, it was coincidental.

Q. Did the abstract show you his period of hospitalization for the purpose of that examination?

A. No, it didn't. He was treated for that along with this—with the other treatment, and it didn't state that any additional hospitalization was required because of that.

Q. I see; did Mr. Hawley give you his history of some slight drainage during the period after he had returned to work and was sailing, following which he reported as an out-patient?

(Testimony of Frank J. Leibly.)

A. Yes, drainage kept reoccurring from time to time.

Q. Was that a disabling condition as far as his regular work was concerned?

A. Probably not disabling, no. It was of minor consequence at the time.

Q. You spoke, Doctor, of the two probable causes of this condition, one being a tear, or an abrasion, in the area, and the other being the possibility of a more profound blow, or more——

A. (Interposing) The second consideration would be [156] conjectural.

Q. I see. Doctor, I presume in your medical education, and college education, you took physics to some extent, Doctor? A. Yes.

Q. What would be your opinion as to a free, swinging blow of some 1700 pounds on a board with a corner on it, which Mr. Hawley tells us hit him, that amount of weight being in the air, stationary, and then from a dead stop being swung a quarter turn; what would be your opinion of two or three men turning that with sufficient force to cause a blow which will be extensive enough to cause this condition?

A. As I stated, it isn't the amount of force necessary, as long as it was sufficient to cause a break in the skin. Bacteria are ordinarily on the surface of the skin, and it only takes a minor break to permit these organisms to get under the skin, and to start developing and start the infection.

(Testimony of Frank J. Leibly.)

Q. That kind of a break could be caused by a person rubbing up against a stationary object?

A. Well, we have all had minor scratches and bruises from a thousand things. It could.

Q. You were referring to an abrasion. I took it to be one or two possible causes, the one being, if it was a harder blow, which was causing infection of some sort? [157]

A. That is correct, and I have no knowledge that there was such a blow. It is a possibility.

Q. Doctor, did you observe any general skin condition of Mr. Hawley other than he told us about?

A. He had a healed acne, rather extensive over his back, which shows rather considerable scar tissue formation. That is not active. It goes back a number of years. Other than that, nothing.

Q. Wouldn't that indicate some condition in the system that would make him probably more susceptible to this type of infection?

A. If it occurred twenty or thirty years ago, it would have, but at the present time, the acne is completely inactive.

Q. Have you, in your—what is the name, Doctor, for this type of infection in that particular area; is there a name for it?

A. No, just infection, localized infection; probably cellulitis.

Q. Umbilitis, too?

A. Umbilitis, meaning pertaining to the umbilicus, or the navel.

(Testimony of Frank J. Leibly.)

Q. That is the name for it?

A. That merely localizes the site at which the infection occurred.

Q. Have you, in your experience, observed other [158] cases? A. I have seen other cases.

Q. Of umbilitis, let me finish, resulting from a history of trauma?

A. They can originate spontaneously by bits of foreign matter, cullular decrease, and so forth, and dirt accumulated in the navel causing irritation and break in the skin.

Q. Without injury?

A. It can occur without injury, it is possible.

Q. And isn't it true that the normal type of umbilitis is that type?

A. That I couldn't say. Probably that would represent the greater portion of them.

Q. And isn't it true that it is probably more prevalent and found in younger children and babies than in older people?

A. It would be much more common, of course, in infancy because that is the site at which the navel cord is attached, the umbilical cord, and during infancy and early childhood it is more tender and more delicate, and more probable of infection. As one grows older, the tissues do thicken up, and the likelihood of infection becomes less possible.

Q. When you say it is oftentimes spontaneous, without injury, is that in many cases related to personal hygiene? [159]

A. Oh, I suppose so.

(Testimony of Frank J. Leibly.)

Mr. Holland: I have no further questions.

Redirect Examination

Q. (By Mr. Kane): Doctor, you had the opportunity to examine these x-rays, did you not?

A. Yes, I did.

Q. And your interpretation of those x-rays are from your reading of them?

A. Yes, because all the x-rays can possibly show are the wire sutures which are present.

Mr. Kane: I have no further questions.

Well, now, Doctor, in your opinion, a blow in this particular area probably could cause this trauma?

Mr. Holland: Now, just a moment. That is objected to as leading, if the Court please.

Mr. Kane: He is an expert witness.

Mr. Holland: But still leading, Counsel.

The Court: It is leading, but I think leading questions may be permissible with an expert witness and the Court will overrule the objection.

Q. (By Mr. Kane): (Continuing) If this man was well, Doctor, and he received this blow and trauma developed at or from this [160] trauma—this infection developed, which was not there before, in your opinion it probably arose out of that?

A. Oh, yes; it certainly could. Trauma that would cause a break in the skin could definitely lead to infection following.

Mr. Kane: I have no further questions.

(Testimony of Frank J. Leibly.)

Cross Examination

Q. (By Mr. Holland): Then, Doctor, there is nothing inconsistent with what you found——

Pardon me, to rephrase that:

There is nothing in what you found in Mr. Hawley that would be inconsistent with this condition in his case being spontaneous, without injury, is there?

A. We can put it this way: Mr. Hawley is fifty years old at the present time. He never developed spontaneous infection previously. Infection did follow trauma. It may have been a coincidence, but the probability of coincidence is not likely.

Q. Of course, in that instance, you assumed the trauma he told you about?

A. That is correct.

Q. And that is all you know about his history?

A. That is all I know.

Mr. Holland: No further questions. [161]

Mr. Kane: That is all.

The Court: That is all, Doctor. You may be excused.

Mr. Kane: I would like to renew my motion to admit the x-rays.

The Witness: Who has the x-rays?

The Court: You may leave them here.

Mr. Holland: If the Court please, as far as the Doctor being excused, I understand the Public Health records may now be put in evidence, and it is possible I may wish to ask the Doctor about

some of those, if they are offered in evidence by counsel.

The Court: These are records upon which he based his examination?

Mr. Holland: No, records of the Public Health Hospital which the Doctor has not seen, nor which counsel or I have seen.

Mr. Kane: They are right here.

The Court: If there is no objection to that.

The Witness: I don't object, Your Honor.

The Court: You may step down, then. Do you wish him to remain?

Mr. Holland: I will advise him, Your Honor.

CAROL ROE

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: State your full name and spell your last name, please.

The Witness: Carol Roe, R-o-e (spelling).

Q. (By Mr. Kane): Will you state your name, address and occupation, please?

A. Carol Roe, 5034 7th Northeast. I am the Assistant Medical Record Librarian at the Public Service Hospital.

Q. And are you custodian of those medical records, Miss Roe? A. That is right.

Q. Do you have with you today the medical records of Mr. Hawley? A. Yes, I do.

(Testimony of Carol Roe.)

Q. And where did you obtain those records?

A. From the Medical Records Department of the Public Health Service Hospital.

Q. And what do those records contain?

A. Well, they contain notations by doctors, nurses, and anyone who treated Mr. Hawley while he was in the hospital. [163]

Q. Now, would you return those records to us, Miss Roe?

A. They are rather voluminous.

Q. I beg pardon. Well, you don't have any historical summary?

A. He was admitted—let's see.

The Court: You are identifying the records now?

Mr. Kane: Yes, sir.

The Court: Ordinarily, if they are admitted, I think the records should be read by counsel, if you wish, unless something facilitates identification here. Are you going to object to identification here?

Mr. Holland: No, your Honor.

Q. (By Mr. Kane): And did you also bring in x-rays of Mr. Hawley's condition?

A. Yes, I did.

Mr. Kane: I would like to offer those records. The x-rays and the medical records at this time.

Mr. Holland: May I ask the witness one question?

The Court: On voir dire?

Mr. Holland: Yes.

Miss Roe, do you have all the records that the hospital has of Mr. Hawley?

(Testimony of Carol Roe.)

The Witness: Yes, I do. [164]

Mr. Holland: As of today?

The Witness: Yes.

Mr. Holland: No objection, Your Honor.

The Court: They haven't been marked, have they?

Mr. Kane: No, we will have them marked and offered in evidence, if the Court please.

The Court: If there is no other questions, Miss Roe may be excused.

Mr. Holland: No other questions.

(Witness excused.)

The Clerk: Plaintiff's Exhibit 6, marked.

(Plaintiff's Exhibit 6 marked for identification.)

Mr. Kane: We would like permission of the Court and Counsel, if there is no objection, to withdraw these medical records at the termination of the action.

Mr. Holland: There will be no objection, then. Well, I should withdraw that. I think we should wait until that time comes before we decide about withdrawing.

The Court: I think it is generally understood after a case is completed, including any possible appeal, if there should be any, upon final determination, upon stipulation of counsel they may be withdrawn.

Mr. Holland: Yes. If the chart and the x-rays [165] together?

The Clerk: Pardon?

Mr. Holland: Were the chart and the x-rays marked together?

The Clerk: No. I am marking them separately. Plaintiff's Exhibit 6 is the chart. Should I mark this as one exhibit?

The Court: The x-rays attached to the statement may be marked as one exhibit, if agreeable.

Mr. Kane: No objection.

Mr. Holland: No objection.

May I see the chart?

(Whereupon, proposed exhibit was handed to Mr. Holland by the Clerk.)

The Clerk: Plaintiff's Exhibits 7, 8, 9, 10 and 11 marked, admitted in evidence.

(Plaintiff's Exhibits 7, 8, 9, 10, 11 marked for identification.)

The Clerk: Admitted in evidence.

The Court: There is no objection, as I understand?

Mr. Holland: No objection.

The Court: They may be admitted. Plaintiff's Exhibit 6 is also admitted.

(Plaintiff's Exhibits Nos. 6, 7, 8, 9, 10 and 11 admitted in [166] evidence.)

The Court: That completes your testimony?

Mr. Kane: Yes, Your Honor.

The Court: Now, Mr. Holland?

Mr. Holland: Yes, I would like to ask the Doctor a few questions.

The Court: In connection with the records?

Mr. Holland: In connection with the records, yes.

The Court: Will you take the stand, please?

FRANK J. LEIBLY

upon being recalled as a witness for and on behalf of the plaintiff, and having been previously duly sworn, testified as follows:

Recross Examination—(Continued)

Mr. Holland: May I approach the rostrum?

The Court: Yes, you may.

Q. (By Mr. Holland): Doctor, as I have indicated, neither counsel nor I had an opportunity to examine these records, and neither have you, and we have had no other medical assistance at this time, and the records are quite voluminous, but I do notice a couple of comments, Doctor.

One comment which says that this 49-year-old able seaman has had an interesting history. In August, 1952, patient was hit with a load of fish, evidently before this, and had an umbilical cyst.

A. An umbilical cyst is a small sack-like structure under the skin. He may have been born with it, or acquired it during the individual's lifetime.

Q. And since Mr. Hawley didn't tell you about the existence of that before this particular incident, it is quite probable that he didn't know about it, is that true?

A. It is quite probable that he did not know of it.

Q. And I notice the comment, Doctor, under date of [168] June, 1954, this 49-year-old white male seaman was readmitted to the hospital at this

(Testimony of Frank J. Leibly.)

time, complaining of abdominal pain and in the fall of 1953, he had an abdominal infection due to, possibly related to, actinoma.

A. That is related to a form of fungus infection. I don't believe that the organism was positively identified as that.

Q. Because they said "possibly"?

A. Possibly.

Q. But, anyway, a bizarre organism would not indicate a trauma or a blow?

A. No, that doesn't follow at all. It means that the organism responsible for the infection was of an unusual type.

Mr. Holland: Pardon me just a moment, Doctor, before we let you go.

The Clerk: Your Honor, I discovered another x-ray here, so that there will be plaintiff's Exhibit 12 also.

The Court: Plaintiff's Exhibit 12 may be admitted.

(Plaintiff's Exhibit No. 12 marked for identification and admitted in evidence.)

Mr. Holland: I have no further questions. Thank you, Doctor.

The Court: Do you have any questions? [169]

Mr. Kane: No further questions.

The Court: That is all, Doctor. You may be excused.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Kane: The plaintiff has nothing further, Your Honor, and rests.

Mr. Holland: The Defendant has a matter to take up with the Court.

The Court: In the absence of the Jury?

Mr. Holland: Yes.

The Court: Members of the Jury, you will now be excused, and the Court calls your attention to the admonition given you last week; namely, that you are to be cautious not to confer with one another regarding any matters relating to this case, or not to discuss it with anyone on the outside, or to discuss any matters that may relate to the merits of this case.

You should be cautious not to form any conclusions or reach any opinions regarding the merits of this case until it is finally submitted to you for your verdict.

You may now be excused.

(Whereupon, the jury retired from the courtroom.)

The Court: Mr. Holland?

Mr. Holland: If the Court please, the defendant [170] moves at this time to dismiss the claim of the plaintiff for the reason he has completely failed to establish any allegation of negligence.

Referring to page 2 of plaintiff's contentions, I will note those there with my comments. Oh, page 2 of the pre-trial order.

Plaintiff's contentions, the first comment is:

"That * * * a pallet board was pushed into the

pit of plaintiff's stomach, pinning him between the pallet board and cases of cans."

That has not been proven.

The second paragraph, that we swung the pallet board negligently "so that it would strike the plaintiff while plaintiff was standing in an area from which he could not escape the impact."

Whether there was negligence or not, is set forth more completely in paragraph IV which reiterates the same thing. They say, first, in paragraph IV that we "failed and neglected to supply the plaintiff with a safe place to work."

There has been nothing shown in this case whatsoever, other than a ten-inch movement of the pallet board that there was anything wrong with the place in which this man was working. They make no complaint, nor does the testimony substantiate that there was not [171] ample room for this man to stand if, in fact, he was standing in a place from which he could not escape.

They say we "failed to supply the plaintiff with a sufficient number of co-employees."

There is no evidence that the number of men who were in the hatch, and I think there was eight or ten, five on each side, was insufficient; no evidence whatsoever that the number of men were insufficient.

There was evidence concerning the officers. There was evidence that the mate, whether it was the chief or the mate, of the watch at least, was in charge of the loading, and that he was on the vessel.

There was no evidence showing where he was at the time.

I don't believe it was said he was in the hold, but there is certainly no evidence to show that his absence from the hold, every precise moment, constituted negligence.

They say we "failed to properly instruct plaintiff in the course of his duties."

There is no evidence here by the plaintiff, or the other witnesses by depositions, that there was anything that we could have instructed him to do that he did not know about when he was injured, or that there was anything wrong other than he was standing in the way of the board. [172]

Next, that we "failed to properly superintend and supervise the work."

The same comment, plus the fact that the plaintiff himself admitted that this one man, I forget his name, one of the seamen of the ten, was nominated by the group to take care of the work, and this one man split the men into two sections and delegated the work to be done on each side, and apparently there was complete supervision of this work, if not the mate at every precise moment, because they had one man that was down in the hold at all times. There was no evidence that this one man was an improper person, or incapable of doing what he says we should have done.

Next, that we "failed to promulgate and enforce proper and safe rules for the safe conduct of said work."

There is no showing what rules we might have

done. There is no showing of the absence of any specific rule.

In brief, there is nothing in the evidence about that claim at all.

Now, counsel will argue, of course, which is the only evidence tending towards this, that there were three men who were inexperienced and who swung the board in a certain way. However, the only person here who [173] even attempted to say that these men were inexperienced is a man who was incapable, as an expert, of saying that, because he was inexperienced himself, and that is Mr. Hawley. He said they were inexperienced, but yet, in spite of the years of work, he said he himself was inexperienced. We need an expert of some sort, an expert who has had sufficient experience to qualify himself as an expert on men, in order for him to do any analyzing of anybody else's work.

That particular point, I think, is the only thing here of which counsel could claim any negligence, and that was done by no person who had any right to tell us whether or not these other men were experienced or inexperienced, and I think by reason of all I have said, that there has been no showing in this case whatsoever.

The Court: Mr. Kane?

Mr. Kane: Your Honor, at this time, in reply, I would like to say this:

That there has been ample testimony by the plaintiff here that he was in a position, backed up against cases of salmon. We have a 1700 pound pallet board coming down and swinging free, and throws him

back, and I can daresay, your Honor, that that is what we mean by "pinning"; he was pinned back, and he [174] couldn't get out of the way.

If there was cargo up in back, he could not step back, and he was pinned in and couldn't get out.

He testified he couldn't go back due to the cases of salmon. To the left, the pallet board was swinging in that direction, and would have struck him in the back, and he couldn't go to the right because a ladder would have struck him. That is what we mean by "pinning in".

Now, counsel said something on a safe place to work. We have ample testimony that this man was on a platform. This platform had to swing between where Hawley was, and the others. It was piled high. Nobody could see one another. There was nobody in there in general to supervise, to explain or to direct the operations of the work. The pallet board came down, and the men grabbed it, and they couldn't see where it was to be located, and they had a general idea, and then it was to be put into place. Here was this man, the plaintiff in this action, backed up against these cases of salmon, and the pallet board had to come down close to him. There was a drop in which those other men would have gone down.

Now, I don't think that is a safe place to work. I think it is important that these vessels be loaded, but [175] I think at the same time, we have got to be sure that these people here that work on these jobs have a safe place.

The Court: What testimony is there that it is not safe?

Mr. Kane: Well, the very fact that we had a drop on the back, which was testified to, and the diagram there, that there was a fifteen-foot drop behind this man Perry, 15-foot drop that forced this pallet board to be shoved forward where Hawley was working.

The Court: Of course, there was no testimony that that isn't a customary and regular way of loading these ships.

Mr. Kane: Well, your Honor, there was no testimony that this was the regular way, with a drop of fifteen feet behind. They might have done that on one occasion.

The Court: The Plaintiff, of course, wasn't on the drop.

Mr. Kane: No, but the fact that he had to be away from the drop forced the pallet board forward, to where he was pinned in at all times unless the work was synchronized. If any little slip came in the movement of the pallet board, this plaintiff was in a precarious position.

We have had testimony also that we have had three men, inexperienced cannery workers, in a position that this man was with three inexperienced men, working on that pallet board, supposedly swinging it around, and there was an agreement that they had that it was to go clockwise, and then it went counter-clockwise.

The Court: Mr. Perry was directing it, was he not?

Mr. Kane: He couldn't have directed it, because he couldn't see these men. This pallet board was piled high. No one could see one another. No one could see the other persons, and here we have this man with his back against the cargo. The board has come down close to him. There can be no slip-up. Any slip-up is going to knock Perry off of the platform. If it goes forward, it will run Hawley into the cases, which it did.

I think in this operation here we should not have had three cannery workers and a wiper bringing down a 1700 pound pallet board and attempting to put it into place. This man was brought out of the engine room to do this particular type of work. We should have had more men there and there should have been sailors there to do this type of work when it was in this position. We have had testimony to that effect.

There was the drop on the one side, and he was up against the cases on the other; and here we have [177] three cannery workers and a wiper and one experienced man who knew how to handle that cargo. One experienced man. There has been no evidence here that anyone was directing it. Perry couldn't direct it. He had to watch himself off the back. He couldn't see the other men. He couldn't direct it.

So, here we have each man practically operating on his own, where we have a gang working in which there should have been someone there, some superintendent, some of the mates, to direct this type of work.

Now, as a result, this man was struck with a pallet board, and was ten months in the hospital, Your Honor. A rather serious hospitalization.

Now, I think failure to promulgate and enforce proper and safe rules—I think something should have been put up in that area in the back. It was for the Company's purpose that that hole was left in the rear behind Perry. They didn't want to get the salmon too close to the fish meal. This situation was created for a purpose, Your Honor. It wasn't something that just arose. There was that space there requiring Perry to keep in as close as he could, and to get that pallet board as far forward as possible, and in doing that, if the work were right, and everybody worked as they should have, Hawley would not have gotten hurt, but [178] Hawley got hurt, Your Honor, because of the manner in which this load was being put into this vessel. There was speed. They needed to work fast, and they were moving fast.

I think we have proved by a preponderance of the evidence that this whole area here was unsafe. There should have been a net behind Perry, and they should have built up the cases where he would have some protection, and Perry could have moved back, or to the side, without being in jeopardy, but he couldn't do that, Your Honor.

I think here we have proved, by a preponderance of the evidence, that there has been negligence here, and that this is a question of fact to go to the jury.

Mr. Holland: May I make two comments, Your Honor?

The Court: You may.

Mr. Holland: First, of course, Perry wasn't the man that was hurt, so that what the conditions were back there haven't been claimed or alleged.

Secondly, if Perry was the man doing the work, and couldn't see the men, counsel would argue that we should have a mate down there. How could he see the men if they were invisible to each other?

Then, he would argue we should have a mate on each corner of the pallet board, which is a reduction to an [179] absurdity.

And then Counsel speaks of this man being pinned into the salmon with no way to get away. Your Honor will recall Mr. Hawley testified he stepped back into the wings to get out of the way of a fall, and the board was in a cross position, and then he stepped out to put his hands on it, and he stepped out two paces and what his estimate was, I don't recall of that distance, but it was at least three or four feet, and then he put his hands on the board, at which time the board came at him, and I had very much difficulty, if the Court please, up to this point, to find out what the conditions were there.

But, in any event, that is the condition of the measurements; but, in any event, Mr. Hawley stepped out to do that. He stepped out to the pallet board to do his work, and put his hands on it and there were no complaints about the men not seeing each other, and the board came at him. Mr. Hawley says it moved ten inches towards him. Even if we assume that a 1700 pound load from a standing

position, standing free, could be pushed with such rapidity to cause this injury, even if we assume that, with his hands on it, he knew it was coming towards him, and he had—ten inches, he says the board moved—but he had at least three feet, to say nothing [180] from some of his testimony that the salmon was even back behind that some little distance, so that I think the idea that counsel has that this man was in a precarious position and that it came down square in front of him is not pointed out by the evidence.

Mr. Kane: I would like to reply.

I think the evidence indicates that this board was moving when it came down. The plaintiff testified that the board was moving.

The Court: I understand.

Mr. Kane: And he stepped out to grab it, and as he grabbed, it was swung in the opposite direction, and the board, swinging in a counter-clockwise direction, threw him back. I don't think the pallet board was just suspended right in the air for the boys to step out and grab it. I think we have a particular situation here where they were trying to load this cargo and get as much in as possible, and they wanted to protect the salmon from the fish meal and it was perfectly all right if no one got hurt, but when we ask the American working man to work under those conditions where we have to put a 1700 pound load in a spot, or else someone will get hurt, I think there is negligence.

There would be no need for a mate or anybody else to be at each corner of the board. They had to

have just [181] one man there supervising and checking when you have inexperienced men, and if we had five sailors there, men who knew their work, there was no need for anyone there.

As soon as these men were there—it happened one-half hour after they started work.

The Court: One and one-half hours.

Mr. Kane: And here we have three cannery workers, the majority of the crew, and one wiper. Out of five men, Your Honor, none of them experienced stevedores and longshoremen, and no one there to tell them how this thing was to go, and we have a 1700 pound load, and these men in a tight corner. If this was out in the open, and on a platform, we wouldn't have had this condition and those men could have gotten along all right, and if they made errors in judgment, nothing would have happened, but I think we have shown negligence due to the precarious position they put this man in, and this load having to go near to Hawley at all times to save the other men. They didn't attempt to build up the other end. They didn't want to destroy the salmon with the odor of the fish. There was no attempt to put a railing or a life net down there which we consider proper and safe rules in case the men fell.

I have nothing further. [182]

The Court: Well, I have reviewed my notes and I think the motion will have to be granted.

I don't believe the Court can assume from the evidence here that the circumstances were such—

place of work such that in and of itself it constituted an unsafe place to work.

There is no evidence, as I indicated in the question of Counsel, as to what any custom may be or practice may be. I think by the very nature of the work—load and pile salmon, or whatever it may be, and stack it up—and the nature of the work itself it constituted an unsafe place to work.

There is no evidence, as I indicated in the question of Counsel, as to what any custom may be or practice may be. I think by the very nature of the work—load and pile salmon, or whatever it may be, and stack it up—and the nature of the work itself may involve, of course, dangers that are incident and a part of the work but I can't see that it isn't a situation where the circumstances—where the doctrine of *res ipsa loquitur* applies, and there isn't any evidence that I think would justify letting the case go to the jury for a finding on that matter.

As to how this happened, it is true enough the pallet board came down and was in a swinging motion, [183] and my notes indicate that the plaintiff grabbed the line to steady it, but just how it happened to swing in to him, or towards him, is unclear. The fact that the cannery workers may have been inexperienced in and of itself, I don't think, is a ground of negligence without some showing, clearer showing or some showing, as to what they did.

Perry was selected there to supervise, was working there and he, of course, was experienced. There is nothing in his testimony, Perry's testimony, to

indicate what happened; and, while the plaintiff has suffered an injury here and I am reluctant to take a case from the jury when I think there is some ground of negligence established that will justify going and taking a case to a jury, yet I feel bound, and I am bound by the rules of law which do require some showing of negligence such that it would justify a jury's passing upon it. But, frankly, I can not see in the evidence here sufficient to justify the case going to the jury and, therefore, the Court is compelled reluctantly to grant the motion.

Mr. Kane: Your Honor, if I may say this at this time: We accept your ruling and we want to point out to you that in this type of case the benefit of doubt should be given to the Plaintiff.

We feel that this is a question of fact whether [184] there has been negligence here and we think that should be left to the jury, and we think we have established a prima facie case by showing the circumstances.

The Court: Mr. Kane, I know undoubtedly that is what you feel but, as I say, I have searched this record and have listened attentively to the testimony, and then knowing, of course, that there must be some showing of negligence by the testimony before the matter can go to the jury, and the Court has the responsibility to pass upon that and I frankly don't think there is any doubt in my mind that there has been a failure.

Mr. Kane: Well, all the Plaintiff has to do, Your Honor, is to establish a prima facie case.

The Court: Well, I don't think you have established a *prima facie* case.

Mr. Kane: And we feel in this area in which these men were working we have established a *prima facie* case with three men on a seventeen hundred pound pallet board and this man backed up against the cases. We think that established a *prima facie* case and I would like to have you reconsider.

The Court: And it is entirely conjectural that they were three inexperienced men. [185]

Mr. Kane: That is the duty of the Company to know. That is the reason we have alleged there was a lack of supervision, and that there should have been that supervision there because no one could see one another. We had five men working on the board which required coordinated work and everyone was working on their own and it was the duty of the Company to have a safe place to work and have those men working together. That could only be done by supervision and as a result of that lack of supervision, these men changing the direction in which the load was turned, was negligence.

The Court: I recognize if anyone is injured it is extremely unfortunate and, of course, if there is any liability or showing of negligence, of course, the matter goes to the jury for determination; but I just don't see, Mr. Kane, that there has been that and I can't find from the evidence that—having in mind that this is loading of a vessel in the hold and in an out of the way port, having in mind that the union agreement as described in the evidence

provides for men such as the plaintiff to accept this work should he choose, I just can't find that the method of loading cargo, with the men available for the work—the type of men—I just can't find that the Company was negligent in following that procedure under the evidence. [186]

Mr. Kane: I think if this man was called as an inexperienced wiper they should have called other sailors, not cannery workers; and we would also like to make a motion for a new trial at this time.

The Court: Of course, I think you are entitled to make your motion and the Court will grant the motion to dismiss and you, of course, may make your motion for a new trial.

Mr. Kane: Thank you.

The Court: You will call the jury.

There is nothing further?

(Whereupon, the jury was returned to the courtroom.)

The Court: You may be seated.

Ladies and Gentlemen of the Jury:

The Court has ruled that there has not been sufficient evidence introduced to justify the case going to the jury.

In other words, the Court has ruled, as a matter of law, that there hasn't been sufficient evidence to establish negligence in this case—by the plaintiff to establish negligence on the part of the Defendant and, therefore, the Court has granted the motion of the Defendant to dismiss the case and that terminates the case and you are now excused. [187]

The Court wants to thank you for your atten-

tion and the inconvenience that the service has caused you and will excuse you now and the earliest time you would be called is next Tuesday. However, do not report until the Clerk calls you.

You are now excused and there is no probability that you will be called again before next week.

Thank you, very much.

(Whereupon, the jury retired from the courtroom.)

The Court: Is there anything further?

Mr. Holland: Thank you, Your Honor.

The Court: Court will recess until two o'clock.

(Whereupon, hearing in the within-entitled and numbered cause was adjourned at 11:21 o'clock a.m., January 11, 1955.) [188]

[Endorsed]: Filed May 10, 1955.

[Endorsed]: No. 14758. United States Court of Appeals for the Ninth Circuit. Richard T. Hawley, Appellant, vs. Alaska Steamship Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: May 9, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Subscription price, Five Dollars per Annum in Advance. Single Copies, Fifteen Cents. Entered as Second-Class Matter, October 3, 1917. Postpaid. Accepted for mailing at special rate of postage provided for in Act of October 3, 1917. Authorized by Act of October 3, 1917. Paid for postage by the publisher. Copyright, 1919, by American Medical Association. Printed at the American Medical Association, 535 North Dearborn Street, Chicago, Ill.

CONTENTS
Original Articles
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

Editorial
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

Correspondence
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

Obituary
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

Books and Reports
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

Advertisements
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

Index
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

Subscription Service
The Medical Profession and the Public
The Medical Profession and the Public
The Medical Profession and the Public

United States Court of Appeals
For the Ninth Circuit

RICHARD T. HAWLEY, *Appellant*,

vs.

ALASKA STEAMSHIP COMPANY, a corporation, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLANT

FILED

SEP 15 1955

KANE & SPELLMAN, **PAUL P. O'BRIEN, CLERK**
Attorneys for Appellant.

1001 Smith Tower,
Seattle 4, Washington.

TABLE OF CASES

Page

<i>Alpha S.S. Co. Corp. v. Cain</i> , 281 U.S. 642 (1929)....	17
<i>American Fidelity & Casualty Company v. Drexler</i> , 220 F.2d, 930 (5th Cir.-1955).....	16
<i>Baltimore & O. R. Co. v. Griffith</i> , 159 U.S. 603 (1895)	14
<i>Burcham v. J. P. Stevens & Co.</i> , 209 F.2d 35 (4th Cir.-1954).....	6, 7, 15
<i>Chesapeake & Ohio Railway Co. v. Martin</i> , 283 U.S. 209 (1931).....	7
<i>Cosmopolitan Shipping Co. v. McAllister</i> , 337 U.S. 783 (1949).....	17
<i>Gunning v. Cooley</i> , 281 U.S. 90 (1930).....	7
<i>Grand Trunk Ry. Co. v. Ives</i> , 144 U.S. 408 (1891)....	14
<i>Jacob v. City of New York</i> , 315 U.S. 752 (1942).....	18
<i>Jamison v. Encarnacion</i> , 281 U.S. 635 (1929).....	17
<i>Koehler v. Presque-Isle Transp. Co.</i> , 141 F.2d 490 (2nd Cir.-1944).....	17
<i>Mandro v. Vibbert, et al.</i> , 170 F.2d 540 (4th Cir.-1948).....	7
<i>Myers v. American Well Works</i> , 114 F.2d 252 (4th Cir.-1940).....	7
<i>National Alfalfa Dehydrating & Mill Co. v. Sorensen</i> , 220 F.2d 858 (8th Cir.-1955).....	6
<i>Texas & Pac. R. Co. v. Gentry</i> , 163 U.S. 353 (1895)	14
<i>Waid v. Chesapeake & O. R. Co.</i> , 14 F.2d 90 (4th Cir.-1926).....	14

STATUTES

35 Stat. 66 (1908).....	18
41 Stat. 1007 (1920).....	1, 17
62 Stat. 930 (1948).....	1

TREATISES

<i>Moore</i> , Federal Practice (2nd Ed.) Vol. 5 pp. 2313- 2316 (1951).....	16
<i>Norris</i> , The Law of Seamen, Vol. 2 p. 10 (1952).....	17

United States Court of Appeals

For the Ninth Circuit

RICHARD T. HAWLEY,	<i>Appellant,</i>	} No. 14758
vs.		
ALASKA STEAMSHIP COMPANY, a corporation,	<i>Appellee.</i>	

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLANT

JURISDICTION

The United States District Court for the Western District of Washington, Northern Division, acquired jurisdiction pursuant to Title 28 U.S.C. Sec. 1331 and Title 46 U.S.C. Sec. 688, and the case was tried in the District Court before the court and a jury, according to the Federal Rules of Civil Procedure. After a trial before a jury lasting several days, the court granted a motion by defendant for dismissal at the close of plaintiff's case on the ground of insufficiency of the evidence to prove a cause of action, and on May 11, 1955, the court entered a final order, a Judgment and Order of Dismissal, *nunc pro tunc* as of February 9, 1955 (R-37). On January 21, 1955, plaintiff filed a Motion for New Trial, supported by an affidavit (R-25 & 26), and at a hearing thereon the motion was denied by an order

dated February 9, 1955 (R-30). Notice of Appeal was filed by the plaintiff on March 4, 1955, and the Cost Bond filed on March 8, 1955 (R-31-32 & 33).

This appeal is being prosecuted pursuant to Rule 73 of the Federal Rules of Civil Procedure and was perfected in accordance with the provisions of Rule 75 of the Federal Rules of Civil Procedure and the Rules of the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

This is an action brought under the JONES ACT (R-3). The appellant, an American seaman, 49 years of age, was serving as a member of the Engine Department of the M/V SQUARE SINNETT on August 21, 1953 (R-10).

On August 21, 1953, at about 8:30 A.M., the appellant was injured while working in the No. 1 hold of the M/V SQUARE SINNETT when a pallet board loaded with 34 cases of canned salmon weighing 1,700 pounds (R-171) struck him in the abdomen (R-95) and forced him back against a row of salmon cases, which were stacked approximately 3 feet behind the position in which he was required to work (R-120). This blow resulted in serious injuries, requiring hospitalization upon the return of the vessel to the Port of Seattle (R-125-126-203-204).

The appellant was ordered to work in the hold on August 21, 1953, by the Chief Mate of the vessel (R-109). Upon reporting to the hold for work, the appellant was assigned to the port side where he and 4 other men were to work cargo loading salmon (R-92-93). A seaman named Raymond J. Perry was in charge of the

hold as far as assigning the men to port or starboard side, and he put 2 of the ship's sailors and 3 members of the Engine Department on the starboard side, and the appellant, himself, and 3 inexperienced cannery workers from the cannery at Uganik, Kodiak Island, where the vessel was loading, were assigned to the port side (R-95 & 111). It was agreed between the 5 men on the port side that when the pallet board loaded with cases of salmon was lowered into the hold by the ship's winches, it would be swung in a clockwise direction as far as possible to a fore and aft position, in order to gain more leeway as it went under the port wing of the ship (R-94-95). At the time the pallet board struck the appellant, it was swung in a counter-clockwise direction, thus causing the board to strike him (R-95).

The swinging of the board in a clockwise direction was to prevent the possibility, as much as possible, of the board swinging too far forward to tiers of salmon behind the appellant (R-94-95-199).

The area upon which the men were working consisted of tiers of cased salmon previously loaded into the hold and comprised a total area of approximately 15 feet (R-104) straight back from the pallet board and across the whole of the ship (R-104-105). At the after end of the hold there had previously been stacked sacks of fish meal, and a space of approximately 4 feet was left between the fish meal and the cases of salmon to prevent contamination of the salmon (R-99). The level of the platform was 12 to 20 feet off the bottom of the vessel, leaving a drop-off of that distance behind where Perry was working (R-199-188).

The appellant, in the forward end of the hold opposite Perry, had only 2 to 3 feet between the edge of the hatch coaming and the tiers of salmon behind him, and was unable to escape to his left because of the existence of an escape ladder at that point (R-105). Perry, in the after portion of the hold, had only a distance of 5 feet to work between the area where the pallet board would clear the hatch coaming and the drop-off behind him (R-99).

At no time on August 21 between 7:00 A.M., when he reported for work and the time he left the hold, did the appellant ever receive any supervision from any officer aboard the ship (R-100).

STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court committed reversible error in granting the motion of the defendant for a dismissal of this cause at the conclusion of the plaintiff's on the grounds of insufficiency of evidence.

2. Whether the trial court committed reversible error by denying plaintiff's motion for a new trial and entering and signing a Judgment and Order of Involuntary Dismissal.

SPECIFICATION OF ERRORS

1. The trial court erred in involuntarily dismissing the cause at the close of plaintiff's case, since there were questions of fact regarding the existence of negligence which should have gone to the jury.

2. The court failed to apply the liberal construction

to the definition of "Negligence," as required by the Jones Act.

3. The court failed to apply the Doctrine of Comparative Negligence in viewing the facts.

4. The court failed to view the evidence in the light most favorable to the party against whom the motion was made and to give the advantage of every fair and reasonable intendment that the evidence could justify.

SUMMARY OF ARGUMENT

The evidence before the court established a prima facie case and the court erred in withdrawing the case from the jury. This is especially true when the evidence is taken in the light most favorable to the appellant and exercising every favorable inference in his behalf.

The evidence clearly shows that appellant was injured as a result of failure of appellee to provide him with a safe place to work. The unsafe condition was the fact that the appellant was required to work in a limited area of three feet, between the pallet board in front of him and the tiers of salmon cases behind him, since the man working on the after end of the pallet board had only five feet behind him to a sheer drop of 12 to 20 feet.

The evidence is uncontradicted that three of appellant's four fellow workers were cannery workers and inexperienced in cargo stowing and that they mistakenly and without warning swung the pallet board in a new and unexpected direction, thereby injuring appellant. Further, the evidence is undisputed that no

officer was present supervising the work at the time of the injury.

The District Court failed in its obligation to let the case go to the jury, unless there was an absence of pleading or proof in support of appellant's case. There were questions of fact upon which reasonable men could differ. Such questions of fact had to be determined by the jury and the court erred in dismissing the action and weighing the facts, itself.

Under the Jones Act, the doctrine of Comparative Negligence applied in this case. The court failed to apply this doctrine by which appellant might recover even though contributorily negligent. The court also failed to apply a liberal interpretation of the term "negligence," as required by the Jones Act.

ARGUMENT

I. Taken in the Light Most Favorable to Appellant, the Evidence Unquestionably Establishes a *Prima Facie* Case

The evidence presented by appellant presented a *prima facie* case. This is especially true when it is viewed in the light most favorable to the non-moving party, the appellant.

The trial court had an obligation to view the evidence in its most favorable light and to give the appellant the benefit of every inference and intendment, when it ruled on appellee's motion for a dismissal at the end of plaintiff-appellant's case. *National Alfalfa Dehydrating & Mill Co. v. Sorensen*, 220 F.2d 858-862 (8th Cir., 1955); *Burcham v. J. P. Stevens & Co.*, 209

F.2d 35, 37 (4th Cir., 1954); *Mandro v. Vibbert, et al.*, 170 F.2d 540, 541 (4th Cir., 1948).

The last cited case dealt with a directed verdict, rather than with a judgment of involuntary dismissal as in this case; however, the same rules for viewing the evidence apply. In that case the court said:

“It is well to recall the settled rule that in considering a motion for a directed verdict the evidence must be considered in its aspect most favorable to the party against whom the motion is made, with every fair and reasonable inference which the evidence justifies. *Gunning v. Cooley*, 281 U.S. 90, 94, 74 L.Ed. 720; *Myers v. American Well Works*, 114 F.2d 252, Certiorari denied 313 U.S. 563.”

On a demurrer to the evidence the same rule applies. *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209, 75 L.Ed. 1983 (1931). In the *Myers* case, *supra*, it is pointed out that the reviewing court also has an obligation to view the evidence at its strongest in behalf of the plaintiff.

When viewed in such a light, it is abundantly clear that the evidence proves the negligence of the appellee in the following three respects:

(1) Appellee failed to provide appellant with a safe place in which to work.

(2) Appellee failed to provide appellant with competent co-employees, and

(3) There was no supervision of the work going on at the time appellant was injured.

A. The evidence shows appellant was injured as a result of appellee's negligence in not providing him a safe place to work

Appellant was injured because he was forced to work in severely confined quarters where there were the triple hazards of a sheer drop of from 12 to 20 feet, a large swinging pallet board loaded with 1700 pounds of canned salmon, and an escape area of less than 3 feet behind him.

The salmon was lowered in to the hold on a pallet board loaded with 34 cases of salmon, weighing 1700 lbs., and the men would catch ahold of the board and swing it near the position where they were required to stack the cases. Appellant was one of a group of five men working on the port side of the vessel. The area in which these men could work was dangerously confined and cramped, due to the presence of rows of stacked salmon cases on the forward and port side and of a 12 to 20-foot sheer drop-off to the rear. The pallet boards were about 5 by 6 feet in size and when a board was in the working area, the appellant had only 1½ to 3 feet between the board and the cases of salmon stacked forward, in which to stand. The man at the other end of the board, standing at the rear, had only about four feet between the board and the sheer drop-off. Witness Raymond Perry, in regard to this condition, said: "You see there is a sheer drop-off, there, of about 20 feet by the bulkhead. It isn't safe for too many men to be on the side I was on" (R. 188).

Since the boards came down into the hold in a swinging manner, it was difficult for the men to stay out of their way, due to this limited working space.

As the board in question came down, in a swinging manner, appellant was against the cases of salmon stacked forward and as he stepped out to swing the board into unloading position, he was struck by the board when the other men swung the board in a counter-clockwise motion, contrary to their previous procedure. Appellant was unable to retreat to a position of safety, due to his confined position between the salmon cases behind him and the ladder to his left. Had the area been greater, appellant would not have been forced to work so close to the board and could have avoided it as it swung toward him. "They swung counter-clockwise, instead of clockwise, and knocked me back against the cases of salmon, just past the ladder. I could not jump out, because the ladder was on this side of me, and on the other side, I had too far to go" (R. 120).

B. The evidence shows appellant was injured as a result of appellee's negligence in failing to provide competent co-employees

The appellee failed to provide appellant with competent fellow workers. All except one of the group working with him were inexperienced in cargo loading. Ten men were sent into the hold to work cargo. Three of these men were members of the deck department, experienced and qualified in cargo handling. Four were members of the vessel's engine room department. The remaining three were cannery workers from ashore. A seaman named Raymond J. Perry was in charge of the hold as far as assigning men to the port or starboard side. He put two of the ship's sailors and three members of the Engine department on the starboard side. The

remaining five men were assigned the port side. One of the men, Perry, was an able-bodied seaman and qualified in cargo handling. Appellant was a member of the Engine department and unqualified in such work. The three other men were cannery workers from ashore, both inexperienced and totally unqualified in cargo loading. Putting all three of the cannery workers in one crew was in itself negligence and constituted a hazard to appellant working with them.

Throughout the morning prior to the injury, the men on the port side had been swinging the pallet boards in a clockwise motion and then under the hatch coaming. No agreement to do otherwise had been made, nor was there any indication that the direction of the swing would be changed. At about 8:45 A.M. a pallet board came down into the hold, swinging more than usual, and the other men swung it counter-clockwise, striking appellant in the stomach and knocking him against the cases of salmon stacked behind him. Appellant describes the occurrence, as follows:

“And in order to swing it clockwise, I was walking on the forward side, on the inboard corner, and we were swinging it clockwise in order so that I could get out from behind, because we had three tiers of salmon already behind, already loaded, and I was underneath the hatch coaming, and the other three fellows were in the wing, and one fellow would take the after side of the inboard corner, and we would swing the board clockwise, and then swing it aft, and at 8:30, when I got ahold of the board, I was between the board and these cases of salmon, and the fellows made a mistake and swung it counter-clockwise, and they caught me between

the cases of salmon and the board, and as soon as it happened, why, the fellow that was working on the same side of me was a ship's delegate for the Sailors' Department, and I reported to him to watch it, and be a little more careful because it hit me in the stomach with the board, and be a little more careful and we could go to work and swing it clockwise again, because there were three cannery workers in the hold, two young fellows and an old fellow who were inexperienced. They had never worked in the cargo before." (R. 95)

Had the men working with appellant been experienced, careful men, they would have been aware of his necessarily precarious position and would not have swung the pallet board counter-clockwise, thus catching him unaware and cutting off any feasible path of retreat. Failure of the appellant's fellow workers to give him any warning of the change in procedure was in itself negligence and sufficient for this case to go to the jury.

C. The evidence shows appellee negligently failed to properly superintend and supervise the work going on at the time appellant was injured

No officer of the vessel was present to inspect, supervise or superintend the loading operation where appellant was working. None of the individuals in the hold were given instructions by any superior officer as to how their work was to be accomplished. Three of the men were totally inexperienced. Four were members of the Engine Department. Perry, an able-bodied seaman, was forced to go about directing the operation as best he could.

A qualified officer could have seen the danger of three cannery workers working on the same pallet board. He should have recognized the undue hazard of the sheer drop-off to the rear of the loading area and ordered a safety net or other protective device be installed. Had proper instructions in procedure under the conditions existing been given to the men in the hold, the accident could have been prevented.

The vessel has an obligation to provide a safe place in which the men can work. It must provide the men with competent co-employees. It is liable for injuries resulting from the incompetence or negligence of any worker. Its officers have a duty to inspect and supervise to prevent injury, due to an unsafe condition or the negligence of incapable workers. No such inspection was made here. Supervision was not given. As a result, the appellant was seriously injured.

It was for the jury to say in this case whether or not there was negligence and a resultant injury. Surely, there is ample evidence upon which they could find negligence. They could have found that defendant was negligent in any one of the three respects detailed above. For the trial court to weigh the evidence and dismiss the case without going to the jury, was clearly error.

II. Under the Evidence the District Court Was Not Justified in Withdrawing the Case from the Jury and Dismissing It

A. There were questions of fact concerning the negligence of the appellee upon which reasonable men might differ and which should have been left for the jury to decide.

There were numerous questions of fact concerning negligence upon which reasonable minds might differ. These questions of fact have been set forth at length in section one of this argument. It is clearly the province of the jury to weigh such facts and determine whether there was negligence. The following opinion aptly sets forth the undisputable law which should govern this case:

“The courts are constantly urged in cases of this character to substitute their judgment for that of the jury on questions of fact; and the seductive argument is made that a conclusion of fact which appears to the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it means that the courts are substituting their judgment for that of the jury on fact questions in violation of the constitutional requirement. Where there is a determinative fact in a case which is either admitted or established by evidence so conclusive that reasonable men could entertain no doubt with regard to it, the court should, of course, direct a verdict as a matter of law; but this does not mean that the court should direct a verdict on a weighing of the evidence or on a decision as to what inferences to be drawn therefrom are the more reasonable. Questions of negligence or con-

tributory negligence are ordinarily questions of fact involving the application of the rule of the reasonably prudent man to the facts of the case, and they are not to be decided by applying "rules of thumb" to the evidentiary facts and treating as conclusions of law what are in reality conclusions of fact. As was well said by Mr. Justice Lamar in *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 417, 12 S.Ct. 679, 36 L.Ed. 485, quoted with approval by Chief Justice Fuller in *Baltimore & O. R. Co. v. Griffith*, 159 U.S. 603, 611, 16 S.Ct. 105, 40 L.Ed. 274, by Mr. Justice Harlan in *Texas & Pac. R. Co. v. Gentry*, 163 U.S. 353, 368, 16 S.Ct. 1104, 41 L.Ed. 186, and by this court in *Waid v. Chesapeake & O. R. Co.*, 4 Cir., 14 F.2d 90, 93:

" "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or

not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.' " *Burcham v. J. R. Stevens & Co.*, 209 F.2d 35, 38 (4th Cir., 1954)

The court in this case entered a judgment of dismissal at the close of appellant's case. This was based upon the court's conclusion that the evidence did not prove negligence. In so ruling the court acted as the weigher of the facts and deprived appellant of his right to have the case tried by a jury. In relation to its granting appellee's motion for dismissal, the court said:

"I don't believe the court can assume from the evidence here that the circumstances were such—place of work such that in and of itself it constituted an unsafe place to work. . . .

"There is no evidence, as I indicated in the question of Counsel, as to what any custom may be or practice may be. I think by the very nature of the work—load and pile salmon, or whatever it may be, and stack it up—and the nature of the work itself may involve, of course, dangers that are incident and a part of the work but I can't see that it isn't a situation where the circumstances—where the doctrine of *res ipsa loquitur* applies, and there isn't any evidence that I think would justify letting the case go to the jury for a finding on that matter.

"As to how this happened, it is true enough the pallet board came down and was in a swinging motion (183) and my notes indicate that the plaintiff grabbed the line to steady it, but just how it happened to swing in to him, or towards him, is unclear. The fact that the cannery workers may

have been inexperienced in and of itself, I don't think, is a ground of negligence without some showing, clearer showing or some showing, as to what they did." (R-230)

The court indicated it had weighed the evidence and had reached the conclusion that no negligence existed, which is precisely the function intended for the jury. If there were any facts which were not clear to the court those were the very facts which the court should have allowed the jury to consider and clarify. The court's opinion showed that it did not believe there was any evidence as to what the inexperienced cannery workers did that injured the appellant. There is abundant evidence in the record that the swinging of the pallet board in a counterclockwise direction caused the injury (R-94, 95, 120, 160). Who but the jury is to say that the inexperience of the men did not cause them to reverse the direction of the board contrary to the planned operation?

Where reasonable men could differ the facts are for the jury to determine. Most of the facts in this case are uncontradicted and it was for the jury to decide whether they met the standard for negligence. *American Fidelity & Casualty Company v. Drexler*, 220 F.2d 930, 932 (5th Cir.-1955), Moore's Federal Practice (2d Ed.) Vol. 5, pp. 2313-2316.

B. The court failed to use a liberal interpretation of “negligence” as required by the terms of the Jones Act.

This action was brought under the terms of the Jones Act, 41 Stat. 1007, 46 U.S.C. §688. The courts have always held that since the Jones Act is remedial and welfare legislation it is to be liberally construed in order to accomplish its beneficent purposes. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 93 L.Ed. 1692 (1949).

Negligence under the terms of the Act is also very liberally construed by the courts in order to carry out the intent of the Act. Norris, *The Law of Seamen*, Vol. 2, p. 310 (1952). *Koehler v. Presque-Isle Transp. Co.*, 141 F.2d 490 (2d Cir.-1944)), says in this regard:

“An employer under the Jones Act is liable for negligence. *Jamison v. Encarnacion*, 281 U.S. 635, 74 L.Ed. 1082; and *Alpha S.S. Co. Corp. v. Cain*, 281 U.S. 642, 74 L.Ed. 1086, teach us that ‘negligence’ as used in that statute must be given a liberal interpretation. We think that it includes any knowing or careless breach of any obligation which the employer owes to the seaman. Among these obligations is that of seeing to the safety of the crew . . . the obligation of a shipowner to his seaman is substantially greater than that of an ordinary employer to employees.”

The court in this case obviously failed to exercise any liberality in considering the presence of negligence in this case. Rather, a narrow and harsh interpretation was used to find that no negligence had been proven. By so doing, the court, in effect, precluded the appellant from utilizing the beneficial effect of the Jones Act.

Had the Act been applied as intended the trial court would not have dismissed the action and the cause would have gone to the jury for determination.

C. The court failed to apply the doctrine of comparative negligence which was applicable under the Jones Act.

Contributory negligence is not an available defense or a barrier to a proceeding under the Jones Act. The doctrine of comparative negligence is applied to such cases.

“Although proof of negligence is an essential to recovery under the Jones Act, contributory negligence and assumption of risk are not available defenses. The Admiralty doctrine of comparative negligence applies.” *Jacob v. City of New York*, 315 U.S. 752, 755 (1942).

“The fact that the employee may have been guilty of contributory negligence shall not bar a recovery.” 45 U.S.C. 53, Sec. 3, Federal Employers Liability Act.

Since contributory negligence was not available as a defense, the action of the court in this case was all the more erroneous.

The jury could have found under the evidence that appellee was negligent on any or all of the three grounds outlined in this brief and that appellant was injured resultingly. There was no contributory negligence proven here, even had it been it would not have barred appellant's recovery. The trial court invaded the province of the jury and, acting as a weigher of the facts, dismissed the case.

CONCLUSION

WHEREFORE, for the aforesaid reasons, Appellant urges that the cause be *reversed* and *remanded* for a new trial.

Respectfully submitted,

KANE & SPELLMAN,

Attorneys for Appellant.

1001 Smith Tower,
Seattle 4, Washington.



**United States Court of Appeals
For the Ninth Circuit**

RICHARD T. HAWLEY, *Appellant*,

vs.

ALASKA STEAMSHIP COMPANY, a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
ROBERT V. HOLLAND,
Attorneys for Appellee.

603 Central Building,
Seattle 4, Washington.

FILED
OCT -8 1955



United States Court of Appeals
For the Ninth Circuit

RICHARD T. HAWLEY, *Appellant*,

VS.

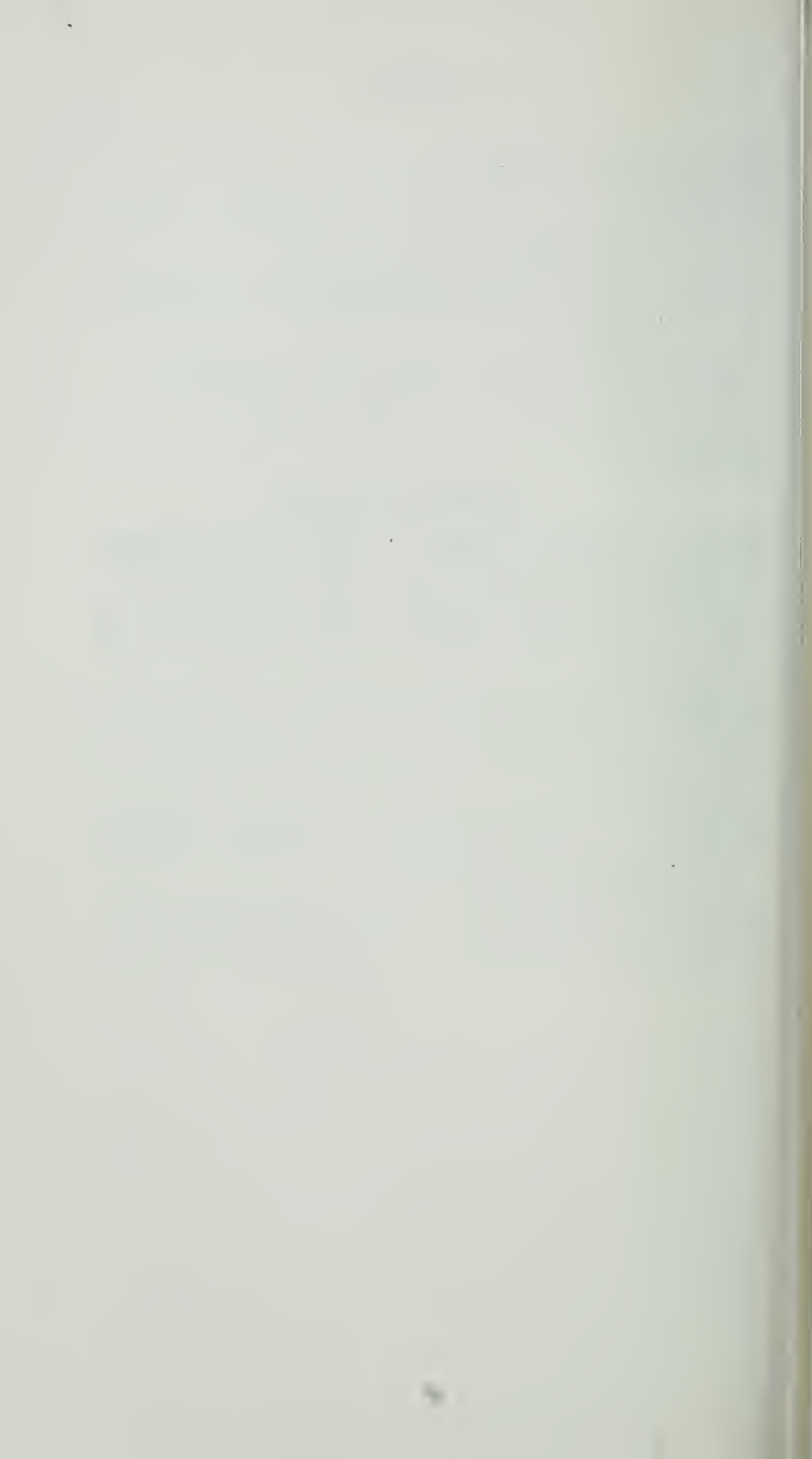
ALASKA STEAMSHIP COMPANY, a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
ROBERT V. HOLLAND,
Attorneys for Appellee.

603 Central Building,
Seattle 4, Washington.



United States Court of Appeals

For the Ninth Circuit

RICHARD T. HAWLEY,	<i>Appellant,</i>	} No. 14758
vs.		
ALASKA STEAMSHIP COMPANY, a corporation,	<i>Appellee.</i>	

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLEE

ADDITIONAL STATEMENT OF THE CASE

The appellant was directed to go to the No. 1 hold of the vessel (R. 109) after being advised by his immediate superior, the first assistant engineer, that it would be alright to take extra work which was available to him under the contract of employment (R. 142, 143, 144). The appellant's statement of the case refers to three inexperienced cannery workers but this description of the three cannery workers appeared only in the testimony of the appellant who later admitted on cross-examination that he did not consider himself an experienced stevedore (R. 163), that he would not be able to tell whether anyone else would be capable (R. 164) and that in any event their actions only "might have been some help to sustaining the injury I got" (R. 151).

As to the direction of the swinging of the load at the time of the injury, the plaintiff's witness Myers did not know whether the men were pushing or pulling (R.

174) and the plaintiff's witness Perry who was supervising the operation testified both that the boards would be swung "that way or the other way" (R. 189) and that this load was handled no differently than previous loads (R. 197).

As to the presence of any officer of the vessel the plaintiff was not at any time asked as to whether he had received supervision from any officer and in fact testified that there was a mate in charge of all the holds (R. 100).

ARGUMENT

I.

The Appellant Failed to Establish a Prima Facie Case.

A. In answer to appellant's argument on the failure of the vessel to provide a safe place to work there should first be eliminated from consideration the oft-repeated phrase of the appellant's brief referring to the "sheer drop" in the hatch. The plaintiff testified that he was working in the forward end of the hold (R. 96) and this is shown on plaintiff's exhibit No. 1 (R. 116) and by the diagram of the plaintiff's witness Myers (plaintiff's exhibit No. 5) (R. 178). On the contrary the "sheer drop" referred to by the appellant's witness Perry was at the after end of the hatch on the other side of the pallet board from the appellant (R. 188). There was no specific allegation of this condition in the pre-trial order (R. 9) and the trial court recognized immediately that this condition was not involved in the case (R. 224).

The fact that the boards came down into the hold in a swinging manner was quite a common occurrence ac-

cording to the testimony of the plaintiff's witness Myers (R. 180). There was no other evidence that the fact that the loads were swinging constituted negligence in any respect.

Appellant states that had the area of work space been greater he would not have been forced to work so close to the board and could have avoided it as it swung toward him. He testified, however, that he had for the past hour and a half walked over to the pallet board after it had been lowered, had grabbed the forward in-board corner and swung the board to get it into position (R. 96). The load had already entered the hold, was down within two or three feet of the deck and was in a swinging motion when he reached out and "grabbed ahold of the corner of the bridle that I was supposed to get" (R. 145). At this time there was no indication that the space in which he was required to work was insufficient. This load was being landed in the usual manner (R. 194). The several men working there were to swing the load to get it into position and the appellant clearly had his hand on the same when this occurred (R. 146).

This was a hanging load of from 1600 to 1700 pounds (R. 146) and the load had only completed a quarter turn when appellant was hit (R. 150). He testified that the corner of the board moved only 10 inches before it hit him (R. 156) and that he knew that it was swinging in his direction (R. 146). With such a heavy load starting from a dead stop and commencing to swing (R. 158) it is inconceivable that the appellant either was unaware of the motion of the load in his direction or that he was hit with any great force by the load.

B. Alleged Inexperience of Co-employees.

In the entire transcript there is only one reference to the co-employees being inexperienced and that is contained in the appellant's testimony (R. 95) in which he speaks of "two young fellows and an old fellow who were inexperienced." On cross-examination, however, he admitted that he did not consider himself an experienced cargo handler (R. 163) and that he could not say that he was able to state whether someone else was capable or not (R. 164). As to the other men in the hold who were members of the vessel's engine room department, it appeared from the testimony of the plaintiff's witness that it is customary in the Alaska run to have such extra work and that the same is provided to at least the firemen by their union contract (R. 142). Even if it be admitted that the fellow workmen *were inexperienced* there is no clear showing of proximate cause between their inexperience and the injury. The appellant on this phase was very speculative in stating as follows: "I would say their inexperience. That *might* have been some help to sustaining the injury I got" (Emphasis ours) (R. 151).

While appellant argues that the pallet boards had been swinging in a particular direction all morning, plaintiff's witness Myers stated that at the time of the accident he did not know whether they were pushing or pulling (R. 174) and the plaintiff's witness Perry stated that he did not know which way the board was being swung and that in any event it would be immaterial since either corner could hit the appellant just as well (R. 199). The appellant's witness Perry also testified that this board was being handled no more rough-

ly than were the other boards being handled that morning (R. 198).

C. A Mate of the Vessel Was Present on Watch and a Supervisory Employee Was Working in the Hold.

The only testimony whatsoever concerning the absence or presence of any officer of the vessel with reference to this work is contained in the testimony of the appellant in which he states that there was a mate in charge of all holds and that he traveled up and down from one hold to another at periods of times (R. 100). In addition the appellant substantiated a custom that one man out of the gang of five stevedores would be picked out to run the gang (R. 100). In the absence of any other testimony whatsoever there is no showing that the lack of supervision was such as to be the proximate cause of the alleged injury.

II.

The Trial Court Was Required to Follow the Scintilla of Evidence Rule as Applied in This Circuit.

The appellant cites cases setting forth the rule that the trial court cannot substitute its judgment for that of the jury in considering the testimony and the credibility of the witnesses. With this there can be no disagreement but the appellant overlooks the scintilla of evidence rule as applied by this court. In *Deere v. Southern Pacific Co.*, 123 F.(2d) 438, cert. denied 315 U.S. 819, 62 S.Ct. 916, 86 L.ed. 1217 (1941) Judge Garrecht was considering the propriety of the trial court's directed verdict for the defendant. The rules applicable to the grounds for giving a directed verdict would apply with equal force to granting of an involuntary dismissal. Judge Garrecht stated:

“ ‘The test as to whether a directed verdict should be granted, is not whether the evidence brings conviction in the mind of the trial judge; it is whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.’ O’Brien, Manual of Federal Appellate Procedure, 3d Ed., p. 15. Respecting the power of the trial court to grant or deny a motion for directed verdict the Supreme Court of the United States stated in *Gunning v. Cooley*, 281 U.S. 90, 91, 50 S.Ct. 231, 233, 74 L.ed. 720, as follows:

“ ‘ ‘ ‘When on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.’” *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 369, 33 S.Ct. 523, 525, 57 L.ed. 879 (Ann. Cas. 1914D, 1029).

“ ‘ ‘A mere scintilla of evidence is not enough to require the submission of an issue to the jury.

* * * ’ ’ ’

Thus this Court followed the rule as set forth by the United States Supreme Court.

The foregoing quotation was repeated with approval in a seaman’s case in *DeZon v. American President Lines* (C.C.A. 9th, 1942) 129 F.(2d) 404, aff’d 318 U.S. 660, 63 S.Ct. 814, 87 L.ed. 1065. In addition Judge Garrecht stated as follows:

“We are reminded by plaintiff that this act ‘is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings’ (*Cortes v. Baltimore Insular Line, supra*, 287 U.S. 367, 375, 53 S.Ct. 173, 176, 77 L.ed. 368), but we must also be mindful of the fact that although the Jones Act has given ‘a cause of action to the seaman who has suffered personal injury through the negligence of his employer’ (287 U.S. 372, 53 S.Ct. 174, 77 L.ed. 368), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty. ‘A seaman is not entitled to compensation or indemnity in the way of consequential damages for disabilities or effects occasioned by the sickness or injury, *except in case of negligence.*’ 24 R.C.L. Sec. 218, p. 1164.” (Emphasis ours)

That the trial judge in the case at bar acted properly under the state of the evidence in determining that there was “not a scintilla of evidence” to support the claim of negligence is shown in a factually similar case decided by this court in 1947, *Seville v. United States* (C.C.A. 9th) 163 F.(2d) 296. In that case the injured seaman was struck by a swinging slingboard which pushed him backward causing him to fall. The court found that the appellant did not move fast enough to escape the swing and as a result sustained his injuries. In the case at bar the plaintiff’s witness Myers testified that it was quite a common occurrence for loads to swing (R. 180).

While appellant contends that the interpretation of negligence as regards seamen must be liberally construed, it still appears from innumerable cases that the

courts, in defining this rule, do so with logic and reason. In *Roberts v. United Fisheries Vessels Company* (C.C.A. 1st 1944) 141 F.(2d) 288, cert. denied 323 U.S. 753, 65 S.Ct. 81, 89 L.ed. 603, the court said:

“But where the injury or death is not the result, in whole or in part of the negligence of the employer, or his agents, the provision has no effect to change the rights or remedies of the parties, and, in the case of a seaman, he takes the same risks of his calling as he did before, but the usual risks of the calling are not shifted on to the employer if the employer is guiltless of any fault.”

The rule in the *Roberts* case, *supra*, was followed with approval by the Second Circuit in *Lake v. Standard Fruit & Steamship Company* (1950) 185 F.(2d) 354, 356, as follows:

“Under these circumstances we think the case is within the rule of *Roberts v. United Fisheries Vessels Co.*, 1 Cir., 141 F.(2d) 288, 293, certiorari denied 323 U.S. 753, 65 S.Ct. 81, 89 L.ed. 603, where the court, acknowledging that the defense of ‘assumption of risk’ was no longer available to the employer under the Jones Act, went on to say: ‘But where the injury or death is not the result, in whole or in part of the negligence of the employer, or his agents, the provision has no effect to change the rights or remedies of the parties, and, in the case of a seaman, he takes the same risks of his calling as he did before under admiralty law. By the Jones Act he is given a right of action for the negligence of his employer which he did not have before, but the usual risks of the calling are not shifted on to the employer if the employer is guiltless of any fault.’

“We recognize that juries are given and should

be given a wide scope in determining all questions of fact. But when it appears, as here, that involved are only 'the obvious and well-known risks of the business' then there is an absence of negligence in law and the case will not be left to the jury. *DeZon v. American President Lines, supra.*'

That this rule is not merely a guide to the trial court but is a *directive* is shown by the decision of this court in *United States v. Holland* (C.C.A. 9th, 1940) 111 F. (2d) 949, 953:

"A federal court is not permitted to submit a case to a jury on probabilities or a mere scintilla of evidence, but there must be some substantial evidence offered by the plaintiff to justify submission of the case to the jury."

III.

The Doctrine of Comparative Negligence

The appellee can have no argument concerning the appellant's contention that the doctrine of comparative negligence is to be applied in this case. The appellant overlooks the possibility, however, that the trial court did apply the doctrine and found that the negligence of the appellee was nil and that the negligence of the appellant was one hundred per cent.

We think the following uncontradicted facts could well have led to this conclusion in the mind of the trial court: The appellant was standing three feet from the edge of the ladder which would have been to his left side (R. 104); he had about three feet available to him at his back where the salmon was stowed (R. 156); the load although it had been swinging as it came into the hatch, was steadied before it was swung anti-clockwise

(R. 158); the appellant knew from the fact that his hands were on the load that it was coming toward him (R. 146); and that the load moved only ten inches before it struck him (R. 156). All of these facts could well have indicated to the trial court that the appellant could have moved to his left a distance of at least three feet to miss the swinging load or that he could have stepped backward a distance of at least two feet nine inches to avoid the load. His failure to do so clearly indicated comparative negligence in the extreme, namely one hundred per cent negligence on the part of the appellant.

IV.

General Duty of a Vessel Owner

It has been often stated that the vessel owner is not required to provide an accident-proof ship. This court in January of 1955 agreed with this view in *Freitas v. Pacific Atlantic Steamship Company*, 218 F.(2d) 562, 564, as follows:

“The law does not impose upon the shipowner the burden of an insurer nor is the owner under a duty to provide an accident-proof ship. *Lake v. Standard Fruit & Steamship Co.*, 2 Cir., 185 F.(2d) 354; *Cookingham v. United States*, 3 Cir., 184 F.(2d) 213. In the condition of the record there was nothing other than speculation on which to base a verdict for the plaintiff. Had the cause been submitted to the jury and a verdict against the shipowner returned, the court, in our opinion, would have been obliged to set it aside.”

The most favorable testimony for the plaintiff on the swinging of the pallet was his own comment that “the fellows made a mistake and swing it counter-

clockwise" (R. 95). This is far from showing by expert opinion or otherwise that proper supervision was lacking, that the co-employees were negligent, or that the place where the appellant was working was unsafe.

Also, the plaintiff in a Jones Act case is under a duty to present evidence not only of negligence, but of proximate cause between the alleged negligence and the injury. This needs no citation of authority but is found in principles of common law. On the swinging of the pallet board there is no evidence relating to proximate cause except that of the plaintiff's witness Perry who testified that he could not recall which way the board was being swung but that in any event he "don't see where that is material because either corner could hit him just as well, whether it went one way or the other" (R. 199). This sole bit of evidence on the swinging of the board disposes of any claim that the direction of the swinging was the proximate cause of the injury.

The appellant's claim that the work place was unsafe is hardly supported by his own testimony that he had three feet within which to move and that the board moved only a matter of ten inches before striking him (R. 156). Thus again, the three-foot area, if it be held to be too small, cannot be said to have been the proximate cause of the alleged injury.

Other than the plaintiff's own statement that the co-employees were inexperienced (R. 95), there is no evidence that said inexperience if it be admitted, contributed to the injury. Likewise, there is no testimony expert or otherwise tending to show that there was in fact any lack of supervision or if there was such lack, that it proximately caused the injury.

CONCLUSION

The trial court not only was permitted but was required by the plaintiff's evidence in the cause and by the rules laid down by this court, to grant the defendant's motion for dismissal at the close of the plaintiff's case. Wherefore, the appellant urges that the action of the trial court be affirmed.

Respectfully submitted,

BOGLE, BOGLE & GATES,

ROBERT V. HOLLAND,

Attorneys for Appellee.

United States Court of Appeals
For the Ninth Circuit

RICHARD T. HAWLEY, *Appellant*,

vs.

ALASKA STEAMSHIP COMPANY, a corporation, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

APPELLANT'S PETITION FOR REHEARING

KANE & SPELLMAN,
Attorneys for Appellant.

1001 Smith Tower,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

SEP -1 1956

PAUL P. O'BRIEN, CLERK



United States Court of Appeals
For the Ninth Circuit

RICHARD T. HAWLEY, *Appellant*,

vs.

ALASKA STEAMSHIP COMPANY, a corporation, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

APPELLANT'S PETITION FOR REHEARING

KANE & SPELLMAN,
Attorneys for Appellant.

1001 Smith Tower,
Seattle 4, Washington.



INDEX

Page

1. Sufficient Evidence Existed under Supreme Court's Latest Ruling.....	1
2. The <i>Seville</i> Case Is Inapplicable.....	3
3. Facts in the Record Were Overlooked.....	3
Certificate.....	6

TABLE OF CASES

<i>Schulz v. Pennsylvania R. Co.</i> , U.S. Supreme Court Docket No. 282, October Term, 1955, 100 L.ed. (Advance p. 430) (1956).....	1, 2
<i>Seville v. United States</i> , 163 F.2d 296 (9th Cir.—1947)	3



United States Court of Appeals

For the Ninth Circuit

RICHARD T. HAWLEY,	<i>Appellant,</i>	} No. 14758
vs.		
ALASKA STEAMSHIP COMPANY, a corpo- ration,	<i>Appellee.</i>	

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

APPELLANT'S PETITION FOR REHEARING

The petitioner, on the grounds following, respectfully petitions for a rehearing of this court's judgment, dated the 3rd day of August, 1956.

1. *Sufficient evidence existed under Supreme Court's latest ruling.* The decision in *Schulz v. Pennsylvania R. Co.*, U.S. Supreme Court Docket No. 282, October Term, 1955, 100 L.ed. (Advance p. 430), which was announced on April 9, 1956, subsequent to the argument of this case, clearly demonstrates that the evidence herein was sufficient to go to the jury.

The *Schulz* case involved a Jones Act suit by the widow of a tugboat fireman, who had drowned without witnesses while tending some barges. There was no evidence as to how the deceased had fallen into the water or from where he fell. There was evidence that the decks of the barges were icy in spots and that the deceased had to depend upon a flashlight for illumination.

The District Court directed a verdict for the defendant, stating: "There is some evidence of negligence, and there is an accidental death. But there is no shred of evidence connecting the two." The Court of Appeals for the Second Circuit affirmed saying that the evidence failed to show "where the accident occurred," or "that it was proximately caused by any default on the part of the defendant."

The Supreme Court reversed, pointing out that the petitioner was entitled to recover if the death resulted "in whole or in part" from defendant's negligence. It said that fair-minded men could certainly find from the facts that defendant was negligent in requiring the deceased to work on the dark, icy and undermanned boats; and that the finding of the drowned body, still gripping a flashlight, would support a finding that the deceased had slipped from an unlighted tug as he groped about in the darkness, attempting to perform his duties.

The court stated in the strongest terms that:

"Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these, as well as others. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. (*Supra*, p. 432-433)."

The evidence in the case before this court is far more

definite, certain and compelling than that in the *Schulz* case, both in regard to negligence and proximate cause. The jury must be given the question of whether the pallet board was negligently swung counterclockwise, and whether that proximately caused the appellant's injury.

2. *The Seville Case is inapplicable. Seville v. United States*, 9 Cir., 1947, 163 F.2d 296, which was cited as a parallel to this case, does not apply, since it was tried to a court without a jury. This court needed only to find there that the evidence did not preponderate against the trial court's decision. Here, the court must determine whether reasonable minds, based upon the evidence and all reasonable inferences, could differ as to the existence of negligence and proximate cause.

3. *Facts in the record were overlooked.* The court found that: "At the time of the impact, by a short backward movement in the space behind him, he could have avoided contact with the board" (Page 6 of the Judgment). This finding overlooked the following questions and answers in the record:

"Q. Why didn't you step back further before it hit you?

A. I would have got the full load right in my whole stomach.

Q. Why didn't you step back into the space alongside this case of salmon?

A. I would have got hit anyway, because I couldn't move left or right.

Q. It didn't pin you against the salmon?

A. It knocked me against it.

Q. It didn't pin you against the salmon?

A. But if it did, it would have pinned me, and maybe killed me.

Q. Did you let go of the bridle when you were hit?

A. I didn't let go until after I was hit, and then grabbed the ladder; but if I had let go of the bridle —

Q. (Interposing) I am not asking you that.

THE COURT: Just a moment. Let him finish.

MR. HOLLAND: All right.

A. (Continuing) If I stepped back, the whole load would have hit me and maybe killed me at that time." (R. 161)

This testimony was sufficient, if believed by the jury, to establish that appellant could not have escaped by stepping backward and that the swinging of the pallet board was the proximate cause of the injury.

Although there was conflicting or vague evidence as to how the pallet was swung, this did not justify taking the issue from the jury. It was also for the jury to decide from the conflicting evidence whether it was immaterial which way the pallet swung. As the fact-witness, the jury should determine if the witness, Perry's, opinion was correct, or if the direction of the swing was material since, had the board been swung clockwise, the corner which the appellant was holding would have swung away from him and there would be no immediate danger from the other corner, which was the length of the pallet board away from the appellant.

WHEREFORE, petitioner respectfully prays that a rehearing be granted and that the judgment of this court

be vacated and modified in accordance with the provisions of law and the facts set forth herein.

Respectfully submitted,

KANE & SPELLMAN,

Attorneys for Appellant-Petitioner.

CERTIFICATE

The foregoing petition for rehearing is in the judgment of counsel well-founded and meritorious, and is not interposed for delay.

KANE & SPELLMAN,

JOSEPH S. KANE

JOHN D. SPELLMAN

Attorneys for Appellant-Petitioner.

No. 14759

**United States
Court of Appeals**
for the Ninth Circuit

SCOTT PUBLISHING COMPANY, a Corpora-
tion,

Appellant,

vs.

RALPH RODGERS, Trustee in Bankruptcy of
Mid-Columbia Publishers, Inc., Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court
Eastern District of Washington,
Southern Division.**

FILED

AUG - 8 1955



No. 14759

**United States
Court of Appeals**
for the Ninth Circuit

SCOTT PUBLISHING COMPANY, a Corporation,

Appellant,

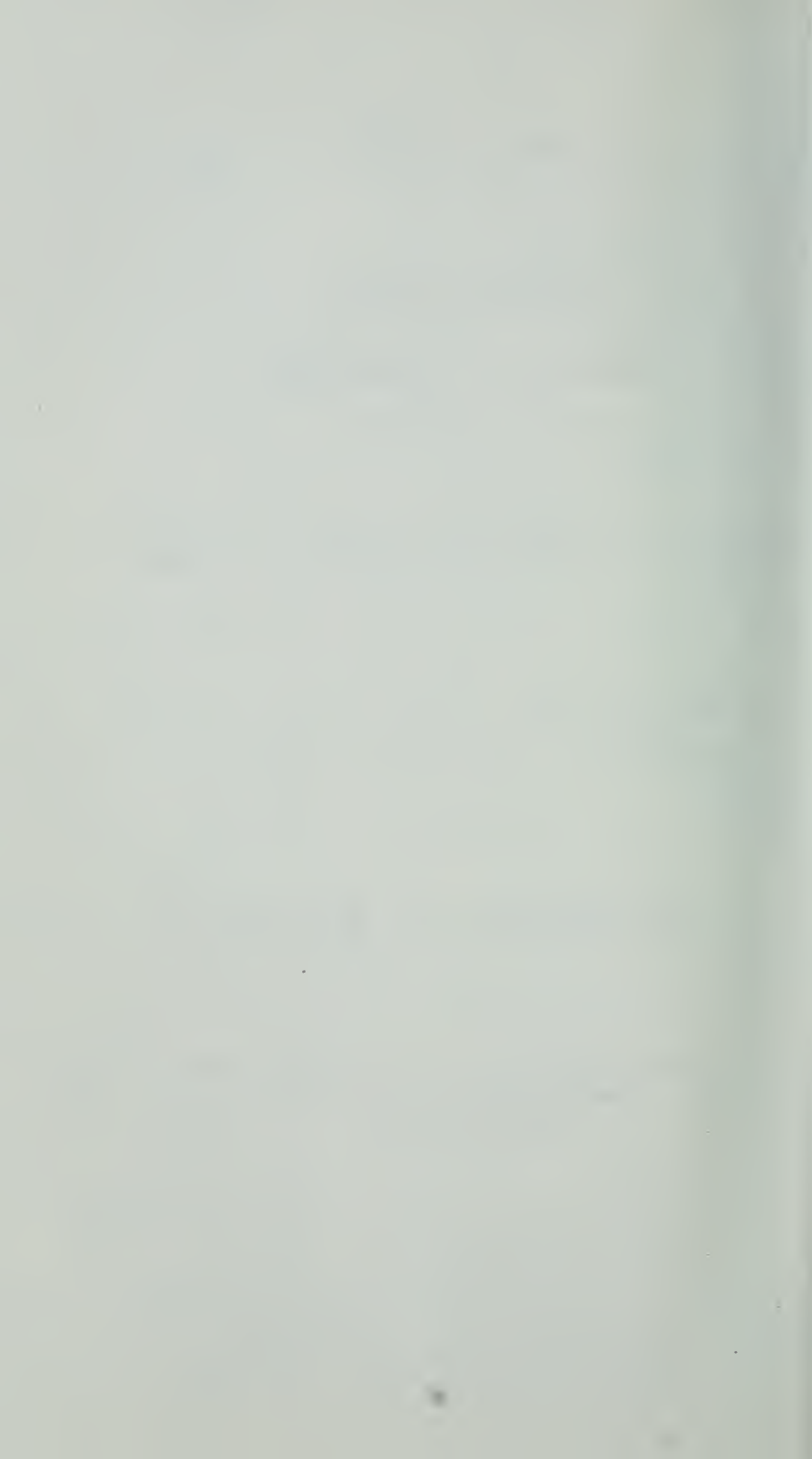
vs.

RALPH RODGERS, Trustee in Bankruptcy of
Mid-Columbia Publishers, Inc., Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court
Eastern District of Washington,
Southern Division.**



INDEX

[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Bond for Costs on Appeal	6
Certificate of the Clerk	54
Names and Addresses of Attorneys	1
Notice of Appeal	5
Order Upon Review	3
Statement of the Case	13
Departmental Opinion	22
Findings of Fact and Conclusions of Law and Order Dismissing Petition	43
Memorandum Opinion on Review of Ref- eree's Findings of Fact, Etc.	50
Order Upon Review	51
Statement of Points	19
Statement of Points to Be Relied Upon by Ap- pellant (U.S.D.C.)	53
Statement of Points and Designation (U.S.C.A.)	57
Stipulation and Order Extending Time for Fil- ing Record and Docketing Appeal	11

THE [illegible] OF [illegible]

BY [illegible]

LONDON: [illegible]

18[illegible]

THE [illegible] OF [illegible]

BY [illegible]

LONDON: [illegible]

18[illegible]

NAMES AND ADDRESSES OF ATTORNEYS

JOHN GAVIN,

Miller Building,

Yakima, Washington,

Attorney for Petitioner-Appellant

(Scott Publishing Company).

THOMAS MALOTT,

708 Spokane and Eastern Building,

Spokane, Washington,

Attorney for Trustee-Appellee.

THE UNIVERSITY OF CHICAGO

1911

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

In Bankruptcy No. B-1544

In the Matter of:

MID-COLUMBIA PUBLISHERS, INC., a Cor-
poration,

Bankrupt.

ORDER UPON REVIEW

The above matter having come on regularly for hearing before the above-entitled Court, the Hon. William J. Lindberg, District Judge, presiding, upon the petition of Scott Publishing Company, a corporation, for review of the Findings of Fact, Conclusions of Law, and Order of the Hon. Michael J. Kerley, Referee in Bankruptcy, of the above-entitled Court, by virtue of which Findings, Conclusions, and Order of said Referee, on March 3, 1954, denied the petition of said Scott Publishing Company, a corporation, for the disbursement to it of the sum of \$8,550.00 by the Trustee from the assets of the above bankrupt estate, and the Referee having filed the record of said proceedings in the above-entitled Court, and the Court having all of the records of the above-entitled bankrupt estate and the records of the proceedings sought to be reviewed before it, and having considered same, the Trustee appearing by and through his counsel of

record, Thomas Malott, and the petitioner appearing by its executive officer, Glenn Lee, and by one of its counsel of record, John Gavin, and argument of counsel having been heard, and the Court having taken the matter under consideration and having filed herein its Memorandum of Opinion on review in which the Court concluded that the said Findings of Fact, Conclusions of Law, and Order of the Referee should be approved and affirmed, and the Court being now fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the Findings of Fact, Conclusions of Law and Order of the Referee entered herein [1*] on March 3, 1954, upon the petition of the Scott Publishing Company, a corporation, for the restitution of the sum of \$8,550.00 from the assets of the bankrupt estate shall be, and the same hereby are, approved and affirmed, and

It Is Further Ordered, Adjudged and Decreed that the petitioner, Scott Publishing Company, shall be, and it hereby is, allowed an exception to this order.

Dated this 19th day of February, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ THOS. MALOTT,
Attorney for Trustee.

Approved as to Form:

/s/ JOHN GAVIN,

Of Counsel for Petitioner,
Scott Publishing Company.

Affidavit of Mail attached.

[Endorsed]: Filed February 21, 1955. [2]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Scott Publishing Company, a corporation, petitioner in the above-entitled matter, appeals to the Court of Appeals for the Ninth Circuit from that certain Order Upon Review entered in this matter by the Honorable William J. Lindberg, United States District Judge, on February 19, 1955, which said Order was entered by the Clerk on February 21, 1955, by virtue of which the Findings of Fact, Conclusions of Law, and Order of the Referee, Honorable Michael J. Kerley, were approved and affirmed and which said Order Upon Review and Findings, Conclusions, and Order of the Referee thereby approved deny the disbursement to the petitioner of the sum of \$8,-550.00 from the assets of the above bankrupt estate to which petitioner claimed that it was entitled by way of restitution.

Dated this 14th day of March, 1955.

GAVIN, ROBINSON &
KENDRICK,

/s/ JOHN GAVIN,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 17, 1955. [3]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Bond No. 243490

Know All Men by These Presents:

That we, Scott Publishing Company, a corporation, the appellant above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Ralph Rodgers, Trustee of the above bankrupt, and the United States of America in the just and full sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Ralph Rodgers, Trustee, his successors, executors, administrators and assigns, and for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of March, 1955.

The Condition of This Obligation Is Such, That,

Whereas, in a proceeding in the above-entitled bankruptcy in the above-entitled Court the petitioner, Scott Publishing Company, a corporation, sought review by said Court of certain Findings, Conclusions and Order of the Referee in Bankruptcy in which said Referee denied said petitioner the right to recover from the assets of the bankrupt estate the sum of \$8,550.00, to which petitioner alleged it was entitled by way of restitution, and

Whereas, upon review of said action of the Referee the above-entitled Court, Honorable William J. Lindberg, District Judge, did enter a certain Order Upon Review affirming and approving the action of the Referee and declining to order the Trustee herein to disburse said sum to the petitioner, which said order was signed by said Court on February 19, 1955, and entered by the Clerk on the Docket on February 21, 1955, and

Whereas, the said petitioner, Scott Publishing Company, a corporation, has filed a Notice of Appeal from such Order Upon Review of the above-entitled Court to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, the condition of this obligation is such that if the said Scott Publishing Company, petitioner, shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed, or the

Order Upon Review and Judgment of the above Court affirmed, or such costs as the said Court of Appeals may award against the said Scott Publishing Company if the judgment or order is [4] modified, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] SCOTT PUBLISHING
COMPANY,

By /s/ GLENN C. LEE,
Sec.-Treas.

[Seal] UNITED PACIFIC
INSURANCE COMPANY,

By /s/ ROBERT E. TENNEY,
Attorney-in-Fact.

Attest:

/s/ R. C. GILBERT,
Vice Pres.

United Pacific Insurance Company
Fidelity and Surety Department
Seattle 14, Washington

No. 92

POWER OF ATTORNEY

Know All Men by These Presents:

That the United Pacific Insurance Company, a corporation of the State of Washington, having its principal offices in the city of Tacoma, Washington.

pursuant to the authority granted by Article IV, Section 8, of its Bylaws, which reads as follows:

“The President, or any Vice President, of this Corporation, in concurrence with the Secretary, or any Assistant Secretary, shall have authority to appoint Resident Vice Presidents, Resident Assistant Secretaries and Attorneys-in-Fact, as the business of the Company may require, and to authorize them, and each of them, to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases or mortgages, contracts, agreements and policies and to affix the seal of this corporation thereto, or to exercise any lesser number of the powers hereinbefore set forth,”

does hereby nominate, constitute and appoint Robert E. Tenney of Yakima, Washington, its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, any and all bonds and undertakings of suretyship.

The execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Tacoma, Washington, in their own proper persons.

In Witness Whereof, the United Pacific Insurance Company has caused these presents to be signed by its President and its corporate seal to be hereto

affixed, duly attested by its Assistant Secretary, this 26th day of May, 1942.

[Seal]

UNITED PACIFIC
INSURANCE COMPANY,

By J. W. REYNOLDS,
President.

Attest:

H. L. BAIRD,
Assistant Secretary.

State of Washington,
County of King—ss.

On this 26th day of May, 1942, before me personally came J. W. Reynolds, to me known, who, being by me duly sworn, did depose and say, that he is President of the United Pacific Insurance Company, the corporation described herein which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal]

JOE PRICE,
Notary Public.

State of Washington,
County of King—ss.

I, Morris E. Brown, Assistant Secretary of the United Pacific Insurance Company, do hereby certify that the foregoing is a true copy of Article IV, Section 8, of the Bylaws of said Company, and is now in force; and I do hereby certify the above and foregoing Power of Attorney is a true and correct copy of a Power of Attorney, executed by said United Pacific Insurance Company, which is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company at the City of Seattle this 14th day of March, 1955.

[Seal] /s/ MORRIS E. BROWN,
Assistant Secretary.

Affidavit of Mail attached.

[Endorsed]: Filed March 17, 1955. [6]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME FOR FILING RECORD AND DOCK-
ETING APPEAL

It is hereby stipulated and agreed by and between the parties hereto that the time for the filing of the record and docketing of the appeal in this matter in the United States Court of Appeals for the

sought from the defendant by the plaintiff Trustee was a certain Model 34 Mergenthaler linotype machine which had been purchased by the bankrupt Mid-Columbia Publishers and was then in the possession of the defendant, Scott Publishing Company, Inc.

That said action came on for trial, and during the course thereof it was stipulated that the corporation had given a note and chattel mortgage in partial payment of the linotype machine and that the balance owing upon the purchase of said linotype machine at the date of the alleged conversion, that is June 11, 1949, was \$8,550. That prior to the bringing of the conversion action, the Trustee sought to recover possession of this linotype machine, but [9] the Scott Publishing Company refused his demands for possession and he sued in conversion for the full market value of the machine.

That during the course of the conversion action in the Superior Court of the State of Washington, the trial judge ruled and instructed the jury that the Trustee in the action as a matter of law could only recover the market value of the linotype machine, less the amount of mortgage indebtedness thereon in the sum of \$8,550, admittedly due at the date of conversion.

That during the course of the trial of said conversion action in the Superior Court, the Scott Publishing Company did not show that it had assumed the mortgage indebtedness due upon the

linotype and had been and was paying said indebtedness. That said action was tried during the month of March, 1952.

That the trial of the conversion action resulted in a verdict in favor of the Trustee in Bankruptcy, and against the Scott Publishing Company, Inc., in the amount of \$22,033. That by its answer to a special interrogatory propounded by the trial court, the jury found that the Trustee in Bankruptcy was entitled to recover the market value of the Mergenthaler linotype in the sum of approximately \$14,000, less the amount of the \$8,550 mortgage indebtedness due thereon. Judgment was entered in favor of the Trustee and against the Scott Publishing Company, Inc., and it appealed from the judgment. The trustee cross-appealed from the failure of the court to add \$8,550 onto the judgment rendered, asserting that the Trustee was entitled to recover the full market value of the Mergenthaler linotype converted, and that the converter was not entitled to have the mortgage indebtedness deducted therefrom.

This cause was argued and determined on appeal by the Supreme Court of the State of Washington, in its cause No. 32161 [10] by a Departmental Opinion filed February 24, 1953, which opinion is reported in 42 Wash. 2d 89, 253 Pac. 2d 925, and a true and correct copy thereof is attached hereto and incorporated herein by reference.

That said Opinion, in substance, affirmed the judgment of the trial court upon the appeal of Scott

Publishing Company, and sustained the Trustee's cross-appeal and directed that the sum of \$8,550 mortgage indebtedness be added to the judgment, for the reasons ascribed in its Opinion, which is attached hereto.

The Scott Publishing Company filed a petition for rehearing in the Supreme Court of the State of Washington, urging, among other things, that the effect of the granting of the cross-appeal was to wrongfully deprive the appellant, Scott Publishing Company, of the sum of \$8,550 and unjustly enrich the Trustee to that extent, and petitioning that the court remand the cause, if necessary, to the trial court to permit the taking of evidence to establish that Scott Publishing Company had assumed and agreed to pay the mortgage, was paying same, and would pay same. This petition for rehearing was denied by the Supreme Court of the State of Washington on April 7, 1953.

Judgment, pursuant to the remittitur of the Supreme Court was thereafter entered in the Superior Court of the State of Washington for Franklin County, and was thereafter paid by the Scott Publishing Company, Inc. Scott Publishing Company, Inc., then filed a verified petition in the above bankruptcy proceeding on April 25, 1953, praying for recovery from the bankrupt estate of the sum of \$8,550 on the grounds that it was entitled to restitution therefor, and that the bankrupt estate had been unjustly enriched to the extent of the sum of

\$8,550. Said petitioner alleged that it had assumed and agreed to pay the mortgage indebtedness due upon the Mergenthaler linotype, was paying and would pay same, and was [11] willing to hold the Trustee harmless from any liability therefor.

That the Trustee answered said petition, generally denying the right of the petitioner, Scott Publishing Company, to restitution and asserting that the proceedings in the State courts, as set forth above, were *res adjudicata* of the petition of Scott Publishing Company. A reply was interposed by the petitioner and a motion to dismiss the petition was also interposed by the Trustee. Upon the issues joined by these pleadings, the matter was tried and heard by the Honorable Michael J. Kerley, Referee in Bankruptcy of the above-entitled court.

That said matter was heard upon the records of the State court proceeding and oral evidence, and that evidence was offered by the petitioner that it had assumed and agreed to pay the mortgage indebtedness on the Mergenthaler linotype, and had reduced it at said time to the sum of \$3,150, and that it would continue to pay all payments due on account of said indebtedness, and save the Trustee harmless therefrom. That evidence was also offered by the Trustee that the evidence that it had assumed and agreed to pay and would pay said indebtedness was within the knowledge of and known to the petitioning Scott Publishing Company prior to, during, and at the time of the trial of the conversion action in the State courts.

That the Referee in Bankruptcy entered Findings, Conclusions, and an Order dismissing the petition of Scott Publishing Company, Inc., for restitution of the sum of \$8,550, all as more fully set forth in said document, a true and correct copy of which is attached hereto and made a part hereof by reference. That in substance, said Referee found as a matter of fact and a matter of law that the judgment of the Superior Court of the State of Washington as modified on appeal by the Supreme Court of the State of Washington was *res adjudicata* of the rights of petitioner, and that the matters and things alleged in its petition in this proceeding were [12] matters that should and could have been adjudicated in the State court proceedings, and that these bankruptcy proceedings constituted a collateral attack upon the State court judgment, that the petitioner was not entitled to equitable relief, and that the petition should be dismissed.

Thereafter, the petitioner, Scott Publishing Company, duly and properly petitioned for a review of the determination of the Referee by the above-entitled court, and the matter duly and regularly came on for hearing before the Honorable William J. Lindberg, United States District Judge, one of the judges of the above-entitled court, who had before him the entire record of the bankruptcy proceedings and the record of the hearing before the Referee in Bankruptcy. The matter was argued to said judge and taken under advisement, and he

thereafter filed a certain Memorandum Opinion, a true and correct copy of which is attached hereto and made a part hereof by reference. That said Memorandum Opinion in substance affirmed and approved the Findings, Conclusions and Order of the Referee in Bankruptcy.

That pursuant to said Memorandum Opinion, an Order was entered hereby by said judge on February 19, 1955, and filed on February 21, 1955, approving and affirming the Findings, Conclusions and Order of the Referee. From said Order and Judgment, Notice of Appeal was filed by petitioner, Scott Publishing Company, Inc., on March 14, 1955, and a bond on appeal was filed. Certified copies of the Order and Judgment appealed from, the Notice of Appeal and of the bond are attached to and transmitted with this agreed Statement of Facts as part of the record on appeal.

Statement of Points

The points involved upon this appeal and which are to be determined under the foregoing agreed Statement of Facts are as follows: [13]

1. Is the Scott Publishing Company, petitioner, entitled to restitution of the sum of \$8,550 from the bankrupt estate on the grounds that the bankrupt estate has been unjustly enriched to that extent at the expense of the petitioner?

2. Is the Scott Publishing Company, by reason of its conversion of the Mergenthaler linotype, in a

position to obtain equitable relief in these proceedings?

3. Is the judgment of the Superior Court of Franklin County, Washington, as modified on appeal by the Supreme Court of the State of Washington, *res adjudicata* of the right of the petitioner to recover any sums from the Trustee by these proceedings?

4. Do these proceedings involve matters which could and should have been adjudicated and determined by the State court proceedings?

5. Do these proceedings constitute an attempted collateral attack upon a valid and subsisting judgment of the Superior and Supreme Courts of the State of Washington?

With respect to the foregoing Statement of Points, it is the position of the appealing petitioner that it is entitled to restitution of \$8,550. and that the bankrupt estate has been unjustly enriched at its expense in that amount; it is not barred from this equitable relief by any conduct on its part; that the judgments of the courts of the State of Washington are not *res adjudicata* of its right to recover in these proceedings; that these matters, particularly a showing of assumption of the mortgage indebtedness on the linotype, and payment thereof by it, should not or could not have been determined in the State court proceedings, and the favorable ruling of the trial court made it unnecessary to make any such showing; and that these proceedings are not a

collateral attack upon a judgment of the State courts of Washington. It is the position of the respondent Trustee, on the other hand, that the petitioning appellant is not entitled to restitution on the grounds of unjust enrichment, that it does not come into court with clean hands entitling it to relief in an equitable proceeding, that the judgment [14] of the State courts is *res adjudicata* of the claims of petitioner, that these matters could and should have been litigated in State court actions, and that these proceedings do constitute a collateral attack upon a valid judgment of the State courts, and that the petition was rightfully dismissed.

In Witness of this Stipulation, the attorneys of the respective parties hereto have executed these presents this 27th day of April, 1955.

/s/ JOHN GAVIN,

Of Counsel for Petitioner, Scott Publishing Company, Inc., a Corporation.

/s/ THOMAS MALOTT,

Counsel for Ralph Rodgers, Successor to Ernest R. Crutcher as Trustee in Bankruptcy for Mid-Columbia Publishers, Inc.

The foregoing Agreed Statement on Appeal conforms to the truth, is a proper Agreed Statement on Appeal pursuant to Rule 76 of the Federal Rules of Civil Procedure, is approved by the Court, and is herewith certified to the United States Court of

Appeals for the Ninth Circuit as the record on appeal herein.

Dated this 3rd day of May, 1955.

/s/ WILLIAM J. LINDBERG,
District Judge. [15]

In the Supreme Court of the
State of Washington

No. 32161

Department Two

ERNEST R. CRUTCHER, as Trustee in Bankruptcy,

Respondent and Cross-Appellant,

vs.

SCOTT PUBLISHING COMPANY, INC.,

Appellant.

OPINION

Cross-appeals from a judgment of the superior court for Franklin County, Ott, Jr., entered April 11, 1952, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Affirmed on the defendant's appeal; remanded on the plaintiff's cross-appeal.

Moulton, Powell, Gess & Loney and Gavin, Robinson & Kendrick, for appellant.

Thomas Malott, for respondent and cross-appellant.

Hill, Jr.—Respondent, trustee in bankruptcy for Mid-Columbia Publishers, Inc., hereinafter referred to as Mid-Columbia, brings this action for the conversion of a newspaper plant and equipment and the consequent destruction of the profitable portion of the then going business of the now bankrupt corporation.

Ralph E. Reed for many years owned and published, in Kennewick, the *Courier-Reporter*, a weekly newspaper, hereinafter referred to as the *Courier*, and operated a job printing business in connection therewith. In 1945, Reed entered into a contract to sell the newspaper and the printing business, the plant and all equipment, to E. Earl Allen and Rolfe W. Tuve for twenty-five thousand dollars. Tuve soon thereafter acquired the interest of Allen. The contract provided, *inter alia*, that payments of five thousand dollars and interest were to be made to Reed on June 1, 1945, and "the first day of the first month of each quarter thereafter." It provided, further: [16]

"9. Time is of the essence of this agreement, and in the event that the buyers shall fail to make any of said payments or any part thereof at the times hereinbefore fixed therefor, or shall suffer or permit any of said goods or chattels to be taken from the buyers' possession or removed from 217 Kennewick Avenue, Kennewick, Washington, or shall make default in any of the conditions above stated, or if at any time the seller shall feel insecured, then this contract may be

forthwith terminated, at the option of the seller, without notice, and the seller shall thereupon be entitled to the immediate possession of all said property wherever situated. And all payments theretofore made to the seller by the buyers shall be retained by the seller as the seller's own property, as compensation for the use and wear and depreciated value of said goods and chattels, and for the seller's loss and trouble."

In 1948, Tuve and his wife organized the Kennewick Printing Company, Inc., a corporation, and Tuve transferred his interest in all of the property covered by the Reed-Tuve contract to the corporation, including his interest in the contract. (The jury established this point by its answer to a special interrogatory.)

Early in 1949, Tuve and some associates launched a venture which envisioned the acquiring of several weekly newspapers in neighboring communities and the starting of a weekly newspaper in Pasco, with the expectation that it might ultimately become a daily. To implement that project, the articles of incorporation of the Kennewick Printing Company, Inc., were amended, its name being changed to Mid-Columbia Publishers, Inc., and the number of shares of preferred stock being substantially increased.

With all of the Tuve interest in the Reed-Tuve contract vested in Mid-Columbia (formerly the Kennewick Printing Company, Inc.), and all of the personal property covered by that contract in its pos-

session, we came to the critical days of June 11 and 12, 1949. It should be noted that a large linotype machine costing approximately fifteen thousand dollars installed, and certain other equipment which had been acquired subsequent to the Reed-Tuve contract and to which Reed had no claim or title, were in the Kennewick plant. [17]

Mid-Columbia, utilizing the facilities in the Kennewick plant, had begun publication of a newspaper known as the Pasco Empire. This venture proved a heavy drain on the resources of Mid-Columbia, and on Saturday, June 11, 1949, the corporation could not meet the payroll at the Kennewick plant. (Some checks in payment of the two preceding payrolls had been returned "N.S.F." but, on being presented at the bank a second time, had been honored.)

On that date, at a meeting in Pasco of those interested in Mid-Columbia, in which meeting Reed participated, one of the subjects of discussion was the acquisition of Reed's interest in the Courier and the Kennewick plant and equipment. Reed at that time appeared to be concerned chiefly about the fact that the payroll had not been met. He made no demand for the five hundred dollars due by the terms of the contract on June 1st, which had not been paid. (Mrs. Tuve testified that there was an agreement that payments were to be made on the fifteenth instead of the first of the month, and other evidence indicated that payments usually were made after the first and by the fifteenth.) One of the men pres-

ent advanced more than one thousand dollars to meet the payroll and Reed apparently was satisfied with that development. He seemed content with a proposal that he meet with the group again to consider some basis upon which Mid-Columbia could acquire his interest in the contract.

Reed testified that, although he indicated at the meeting at Pasco Saturday afternoon certain terms and conditions under which he might be willing to dispose of his interest in the Courier and the printing plant, he made no definite commitments. He testified, further, that after he left the meeting he became so convinced of his insecurity under the contract that he went directly to the Courier office in Kennewick, and there told the employees that their checks would come in, and told Mrs. Tuve that he would have to take the business back. He testified, further, that, [18] while he was talking to Mrs. Tuve, Mr. Tuve came in and Mrs. Tuve advised him of what Reed had just told her, and that neither of them voiced any objection or protest. Reed fixes the time of this repossession at about seven p.m. Both Mr. and Mrs. Tuve deny any meeting with him in the Courier office at that time.

Mr. Tuve testified that he did not return to Kennewick following the meeting in Pasco until after ten p.m. Mrs. Tuve testified that she saw Reed's car outside the Courier office at five-thirty or six o'clock that evening and supposed Reed was in it, but that he did not come into the office and she did not talk to him, and that she left the office before

six-thirty p.m., and did not return that night. She testified, further, that sometime between eleven and eleven-fifteen that night, Reed called her at home and told her that he had sold the contract to Lee (Glenn C. Lee, one of the officers of the Scott Publishing Co., Inc.).

The jury apparently did not accept the Reed version of the repossession, for in answer to a special interrogatory, it found that he never made a valid repossession of the property described in the Reed-Tuve contract.

Reed testified, further, that about eight-thirty that same evening he called his attorney and asked whether there was anything that would prevent his selling "the shop" and was advised that there was not. He thereupon contacted Lee and met him at the office of the appellant at about nine or nine-thirty that night. There, without benefit of counsel, Reed and Lee arrived at an agreement and Lee typed the following document, which both parties signed:

"This is a memorandum and agreement between Ralph E. Reed and the Scott Publishing Co., Inc.

"Ralph E. Reed is the holder and owner of a Seller's contract to Rolphe Tuve, which contract is in default, because of non payment June 1st, 1949, by Tuve of the payment and interest due. This contract covers the sale by Reed to Tuve of the Kennewick Courier Reporter and Printing Co.

“By such default, Reed is again in possession by law, as owner of the property. [19]

“Reed desires to sell his ownership in the above-mentioned contract to the Scott Publishing Co., Inc. Glenn C. Lee, Sec. Treas, of the Scott Publishing Co., acting for the corporation, has evinced his desire to buy the contract and Reed’s position as it now stands * * *

“The intent and action on the part of Reed is to sell his interest and ownership in the contract and in the Kennewick Courier Reporter and Printing Co., and the intent and action on the part of Lee, acting for the Scott Publishing Co., Inc., is to buy said interest and ownership.

“Therefore by the signing and witnessing of this agreement, Reed sells, and Lee buys, above-mentioned interests and ownership.”

The purchase price, not mentioned in the typewritten “memorandum and agreement,” was fifteen thousand dollars, of which five hundred dollars was paid by Lee that night. (The balance due Reed on the Reed-Tuve contract was \$12,150.)

Reed testified that he went directly home after his meeting with Lee, and stayed there.

Several witnesses testified that that same night, about eleven p.m., Reed went to the Courier office and told a group gathered there, including Tuve, who arrived later, that he had sold his interest in the Reed-Tuve contract to Glenn Lee. It is apparent that

there is a vast difference between the transaction as those witnesses understood Reed to say it was (i.e., that he had sold his interest in the contract) and the transaction as Reed and Lee understood it (i.e., that Reed had repossessed the property and sold the repossessed property to Lee).

Early the next morning (Sunday), representatives of the appellant took possession of the Courier office and the printing plant. Locks were thereafter changed on the doors; the windows were barred; a man armed with a shotgun was placed on the premises.

The five-hundred-dollar payment and accrued interest due June 1st by the terms of the Reed-Tuve contract was tendered to both Reed and Lee on June 15th, and was refused. Its principal asset gone, Mid-Columbia was soon in bankruptcy, and the [20] trustee in bankruptcy brought this action for the conversion of the corporation's property and the damages resulting therefrom. The jury brought in a verdict of \$22,033 for the trustee in bankruptcy, and the Scott Publishing Co., Inc., appeals. The trustee cross-appeals, contending that an offset of \$8,550 against the judgment should not have been allowed.

(1) Contrary to appellant's contention, the transfer by Tuve of his interest in all of the property covered by the Reed-Tuve contract to the Kennewick Printing Company, Inc., a corporation, did not have to be evidenced by a writing. The trial court

correctly stated the law when it advised the jury that the interest of Tuve in the Reed-Tuve contract could be assigned orally; that any language, however informal, which shows the intention of the owner of a right or interest in property to transfer it, will be sufficient to vest the property in the assignee; and that, in determining whether such an assignment had actually been made, the jury was entitled to take into consideration the actions of the parties with reference thereto, as well as all the circumstances attending the alleged assignment. *Seattle Nat. Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262 (1897); *Morehouse v. Spokane Security Finance Corp.*, 175 Wash. 501, 27 P. (2d) 697 (1933); 4 Am. Jur. 287,290, Assignments, §§ 74, 77; Restatement, Contracts, § 157. Nor does RCW 65.08.040 (cf. Rem. Rev. Stat., § 5827), requiring the recording of bills of sale, have any bearing on the question. That provision of the section cited is for the benefit of two classes of persons, existing creditors and innocent purchasers. *Morehouse v. Spokane Security Finance Corp.*, *supra*. Appellant was neither.

(2) Appellant urges that more than a change of name was involved in the amendment of the articles of incorporation when the corporate name was changed from Kennewick Printing Company, Inc., to Mid-Columbia Publishers, Inc., that the changes really created a new corporate entity with a new purpose; and that a transfer of [21] assets from

the Kennewick Printing Company to Mid-Columbia was necessary.

The only case cited by appellant in its contention is *Midland Co-Op. Wholesale v. Range Co-Op. Oil Ass'n.* 200 Minn. 538, 274 N.W. 624, 111 A.L.R. 1521 (1937), in which the court construed a Minnesota statute and said:

“The statute permitting amendments clearly implies that the amendments should not change the nature or character of the business * * * The statute does not authorize fundamental changes.”

Our own statute on amendments, which is part of the business corporations statute of 1933, provides:

“A corporation at a meeting of the shareholders duly called upon notice of the specific purpose, may amend its articles in any respect so as to include any provision authorized by this title * * * ” RCW 23.12.060; cf. Rem. Rev. Stat. (Sup.), § 3803-37.

As indicated, the only amendments in this changed the name of the corporation and increased the number of shares of preferred stock. No new corporation was created under our statute. Appellant's assignments of error dealing with this phase of the case are without substance.

That the actions of the appellant in taking possession of the newspaper office and printing plant constituted high-handed seizure of a new Mergen-

thaler linotype machine and other equipment installed in the Kennewick plant and subsequent to the Reed-Tuve contract and to which Reed had no claim, there can be no doubt. Whether or not there was a conversion of the property covered by the Reed-Tuve contract is the primary issue presented on this appeal. There was such a conversion unless Reed or the appellant had a right to repossess the property and, in furtherance of that right, did repossess it.

The claimed right of repossession is twofold: (1) the failure to make the payment due June 1st, which it will be noted is the only reason referred to in the agreement between Reed and the appellant for Reed's having repossessed the property, and [22] (2) the fact that the seller (Reed, or the appellant as his assignee) felt insecure.

As to the first, the jury could have found that there was an oral agreement that the payment could be made on the fifteenth rather than the first of the month. Even if there was no such agreement, the jury was entitled to find that the seller, by regularly accepting payments between the first and the fifteenth of the months in which they were due, had, temporarily at least, waived the right to terminate the contract for failure by the purchaser to make the payment on the first day of June.

(3) After such a waiver, in order to reinstate the original terms of the contract, the seller must give notice of his intention thereafter to demand strict

compliance with the terms of the contract and must allow the purchaser a reasonable opportunity to comply. In *Lundberg v. Switzer*, 146 Wash. 416, 263 Pac. 178, 59 A.L.R. 131 (1928), we said:

“The appellants cite a long line of cases from this and other courts holding that the right of forfeiture cannot be exercised without demand and a reasonable opportunity to comply after there has been a waiver of strict performance by the acceptance of delayed payments. About this rule there is no controversy, as it is firmly written into the law.”

Cunningham v. Long, 134 Wash. 433, 235 Pac. 964 (1925); *Beardslee v. North Pac. Finance Corp.*, 161 Wash. 613, 44 P. (2d) 186 (1935); *Franklin v. Gilbert Ice Cream Co.*, 191 Wash. 269, 71 P. (2d) 52 (1937); *Knoblauch v. Sanstrom*, 37 Wn. (2d) 266, 223 P. (2d) 462 (1950); *Restatement, Contracts*, § 300.

In the present case, the trial judge charged the jury, by instruction No. 14:

“You are instructed that the remedies given to a seller under a conditional sales contract, upon default by the buyer, are for the seller’s own benefit and when he knows of such default he may waive the default, either expressly or impliedly. A seller may either expressly or impliedly waive his right to insist upon strict compliance with the terms of said contract. The default of a buyer may be waived by the seller

subsequently treating [23] the contract as still in force and such action is a waiver of the right to forfeit the contract. *Such a course of conduct will bar the seller's right to assert a forfeiture for any payment not made at the time stated in the contract unless prior thereto he has given notice to the buyer that he intends to hold him to the original terms and the buyer has had a reasonable opportunity to comply with such notice.* You are instructed that if you find by a fair preponderance of the evidence that the seller had waived the default or defaults, if any, by the buyer he is under the necessity of giving notice to the buyer and a reasonable opportunity for the buyer to cure his default or defaults before forfeiture and repossession can be claimed." (Italics ours.)

Under the facts in this case, instruction No. 14 stated the law with reference to waiver of defaults by a seller and was clearly applicable to the claimed right of repossession based on the failure to make the June 1st payment or on the removal of certain of the property from the premises, and was proper.

Appellant urges that the jury might have concluded therefrom that notice was a requisite to repossession if the seller felt insecure. Repossession on the ground of insecurity was covered by instruction No. 11, which contained no reference to waiver, and there is no reason to suppose that the jury applied instruction No. 14 to the claim of a right to

repossession on the basis of insecurity. We find no error in the giving of instruction No. 14.

(4) Appellant places greatest reliance upon the proposition that Reed (or the appellant as his successor in interest in the contract) was entitled to take possession of the property covered by the contract because he deemed himself insecure.

The property was not mobile and capable of easy removal; it was not being destroyed, secreted, or moved away. The seller's security would have been imperiled by a failure to publish the Courier on the following Thursday, in which event the Courier would have lost its status as a legal newspaper and its second-class mailing privilege. However, the payroll problem apparently had been solved for the time being and there was no showing which [24] would enable the court to say that there was, as a matter of law, justification for seizure Sunday morning, June 12, 1949, without giving the contract purchaser an opportunity to demonstrate that the Courier could and would continue to be published.

The instruction given on the right to repossess without notice in the event the seller felt insecure was, we feel, very favorable to the appellant. The jury was told that if the seller acted reasonably and not arbitrarily, and if there existed proper cause to apprehend some loss to his security or if the buyer had committed or was about to commit some act that would tend to impair his security, the seller could, without notice, terminate the contract and take immediate possession of the property.

The jury found, as we have pointed out, that Reed never did repossess the property. It could also have believed that by a desire to keep the Courier out of the control of Pasco people and to make a profit of almost three thousand dollars, rather than by a feeling of insecurity.

We note an unwarranted assumption by appellant that if there was a conversion it was an ordinary and not a wilful conversion. This assumption is based upon a statement in *Glaspey v. Prelusky*, 36 Wn. (2d) 592, 219 P. (2d) 585 (1950). We there discussed one situation that constituted a wilful conversion, but did not attempt to give an inclusive definition. We did say that an ordinary conversion is one that is unintentional and inadvertent, which is far from the situation in the present case.

One of appellant's assignments of error is that the trial court should have held that Mid-Columbia had no right or title to the newspaper or the property in the printing plant because in 1946 Tuve secured a three-thousand-dollar loan from one Henry Smith, pledging as security an assignment of his interest in the Reed-Tuve contract. The note and assignment were held in escrow in a Kennewick bank, with instructions whereby the assignment was to be delivered to Smith only if Tuve defaulted in the payments [25] due on the note and Smith deposited with the bank.

“* * * a Notice showing Five (5) days' notice of his intention to claim default in this agreement

and service of the same upon the said Rolfe W. Tuve at Kennewick, Washington, but if such demand is so made, and proof of service of said demand so filed with you (the bank), in (sic) the said payments should not have been made through your bank within five (5) days from the service of said notice, then the provisions of this Agreement shall be executed forthwith, without further notice to any party.”

Tuve had not made all the payments required by the note, but prior to the events of June 11 and 12, 1949, Smith had indicated no intention of taking action to enforce his rights. On June 23, 1949, the required five-day notice, signed by Smith, was served on Tuve. Tuve made no payments after the service of the notice, and at the termination of five days the note was canceled and returned to Tuve and the assignment of the Reed-Tuve contract was delivered to Glenn C. Lee, as assignee of all of Smith's interest in the contract, Lee, as assignee of all of Smith's interest in the contract, Smith having assigned his interest to Lee by instrument dated June 22, 1949, which recited:

“Whereas, the escrow instructions with which said contract and assignment were delivered, have been performed and the pledge of said contract has been foreclosed.”

Appellant seeks to set up the title thus secured as a defense to the conversion action.

(5) Mid-Columbia's right of action accrued June 12, 1949. Neither Smith nor the appellant had any title at that time by virtue of the assignment. The appellant acquired nothing by virtue of Smith's assignment to Lee (so far as this action is concerned) except the possible right to offset the balance due on the Smith note against the damages for which the appellant was responsible. See *Burnett v. Edw. J. Dunnigan, Inc.*, 165 Wash. 164, 4 P. (2d) 829 (1931); *Helf v. Hansen & Keller Truck Co.*, 167 Wash. 206, 9 P. (2d) 110 (1932). That offset was allowed.

(6) We are convinced that the jury correctly determined that there was a conversion by the appellant and there was no [26] evidence to support any theory that appellant was merely in possession of property converted by some one else.

(7) This was conversion of a character that rendered the making of a demand unnecessary. As we said in *Hill's Garage v. Rice*, 134 Wash. 101, 107, 234 Pac. 1023 (1925):

"In any event, a demand was unnecessary either for the property or for damages as for its conversion, in view of the defendant's claim of ownership thereof. The defendant's attitude in this controversy from the very beginning absolutely negatives the necessity for a demand. It is conclusively shown that a demand would have been unavailing in view of the defendant's claim of ownership of the property and his defense of this action upon the merits."

See, also, *Richardson v. Great Western Motors*, 109 Wash. 324, 187 Pac. 333 (1920); *Burnett v. Edw. J. Dunnigan, Inc.*, *supra*; *Kohout v. Brooks*, 185 Wash. 4, 52 P. (2d) 905 (1935).

We now turn to the issues raised as to the amount of the damages.

(8) There is no merit in appellant's contention that the court erred in permitting a trial amendment asking damages for the destruction of a going business. This amendment was made without objection or exception. While it is true that, because of the expansion into the Pasco area, Mid-Columbia was operating at a loss, the jury could have found that the *Courier* and the job printing business in Kennewick constituted an established and profitable business. We have heretofore recognized that a recovery can be had in a conversion case for damages to an established business. *Seeley v. Peabody*, 139 Wash. 382, 247 Pac. 471 (1926).

We think that a wrongdoer cannot take over the valuable and profitable part of a corporation's business and thereby stop its total operation and then, because the corporation in its total operation was losing money, say there is no liability. The nature of the case is such as the wrongdoer has chosen to make it. There was evidence that any loss being sustained by Mid-Columbia was not due to lack of profit in the operation of the *Kennewick Courier* and [27] the job printing business in that city. The market value of that newspaper and the printing business.

including the plant and all physical equipment, was set at fifty to fifty-five thousand dollars by one expert witness; Tuve placed a much higher value on it. The jury allowed \$27,974 on the equipment taken and \$17,000 for the damage and destruction of the business. The verdict was well within the evidence.

Appellant's complaint against an instruction warning the jury against quotient verdicts (and describing them) is without semblance of merit. There was no question of a quotient verdict here. The instruction began, "If you should find that the plaintiff is entitled to a verdict . . ." It cannot justifiably be said, as asserted by appellant, that such an instruction was an invitation to return a verdict for the plaintiff. The instruction was unnecessary but certainly not prejudicially erroneous.

We are satisfied that, on appellant's appeal, the judgment should be affirmed.

Respondent cross-appeals because the appellant was allowed to set off \$8.550 which remained unpaid on the mortgaged Mergenthaler linotype machine against the \$14,974 found to be the amount of damage for the conversion of the equipment not included in the Reed-Tuve contract.

(9) We think respondent's point is well taken. A person who is entitled to bring an action for a conversion, although he has a limited interest in the property converted, may, as against a stranger, recover the full value of the property. *Hadley Warehouse Co. v. Broughton*, 126 Wash. 356. 218 Pac.

257 (1923); *Burnett v. Edw. J. Dunnigan, Inc.*, supra; *Anstine v. McWilliams*, 24 Wn. (2d) 230, 163 P. (2d) 816 (1945); *Angell v. Lewistown State Bank*, 72 Mont. 345, 232 Pac. 90 (1925); 53 Am. Jur. 907, *Trover and Conversion*, § 121.

In *Corey v. Struve*, 170 Cal. 170, 149 Pac. 48 (1915), the supreme court of California said: [28]

“The rule that the owners of a special interest in property may recover only to the extent of such interest applies only to cases where the suit is brought against the owner of the remaining interest or his assignee.”

The question of settlement between appellant and the third person who also owns an interest in the property is not before the court. *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480.

If appellant wanted credit for \$8,550 on the judgment, it had the burden of showing that it had paid that amount or had exonerated Mid-Columbia from all liability therefor; and that appellant failed to do. It was therefore error to offset that amount against the judgment.

It is urged that, while respondent took proper exceptions to that portion of instruction No. 29 which reads:

“If you find for the plaintiff for any sum by reason of alleged conversion of any property not included in the Reed-Tuve contract then plaintiff is entitled to recover the fair cash

market value of such property at the date of the alleged conversion thereof, *less any lien indebtedness thereon.*" (Italics ours.)

he did not except to almost identical language in instruction No. 6, and, by reason of his failure to except thereto, the language of instruction No. 6 became the law of the case.

We do not find the same error in instruction No. 6 as in instruction No. 29, because the court said in the former:

"In the event you find any mortgage, pledge, or lien indebtedness existed upon such property *which the defendant has either paid or assumed and agreed to pay* such sum should be deducted therefrom in order to arrive at the net amount of the recovery for the item or items, if any." (Italics ours.)

The element of the appellant's having paid or assumed and agreed to pay the mortgage, pledge, or lien indebtedness was omitted from instruction No. 29.

(10) In any event, under the rule laid down in *Franks v. Department of Labor & Industries*, 35 Wn. (2d) 763, 215 P. (2d) 416 (1950), and adequate exception to one of two or more instructions subject to the same error is sufficient to challenge the consideration of the trial court, which is the purpose of the exception, [29] and to bring the question here for review.

(11) Nor is the argument of appellant that we

can add the \$8,550 to the judgment only as an alternative to a new trial of any force in a situation such as the present, where the set-off is a liquidated amount. If the set-off was erroneously allowed or erroneously disallowed, judgment would be automatically increased or decreased by the amount thereof. *Richardson v. Great Western Motors*, 109 Wash. 324, 187 Pac. 333.

The judgment is affirmed on the appeal and the case is remanded on cross-appeal, with instructions to increase the judgment by \$8,550.

Schwellenbach, Hamley, Finley, and Olsen, J.J., concur.

April 7, 1953. Petition for rehearing denied.

Filed February 24, 1953, Supreme Court for the State of Washington. [30]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW, AND ORDER DISMISSING PETI-
TION OF SCOTT PUBLISHING COMPANY,
INC.

At Spokane, in said District, March 3rd, 1954.

Scott Publishing Company, Inc., having filed herein its petition, verified the 24th day of April, 1953, and filed in this proceeding on April 25, 1953,

praying for the recovery from the bankrupt estate of the sum of \$8,550.00, and issue having been joined in said proceeding, and Ralph Rodgers, the successor Trustee of Ernest R. Crutcher, having been substituted as respondent to said petition by virtue of an order dated July 25, 1953, and said matter having come on for hearing and trial on July 23, 1953, at the hour of two o'clock p.m. of said day, at the office of the undersigned Referee, 1206 Old National Bank Building, in the City of Spokane, the petitioner, Mid-Columbia Publishers, Inc., appearing by John Gavin, of counsel for petitioner, and the Trustee appearing by his attorney, Thomas Malott, and evidence having been adduced, and the matter having been submitted to the Court, the Court does now make the following:

Findings of Fact

I.

Petitioner is a corporation, organized and existing under and by virtue of the laws of the State of Washington and has paid all license fees due and past due said state engaged in the publication [31] of a daily newspaper within the above District, maintaining its principal office at the City of Kennewick, Benton County, Washington.

II.

Ralph Rodgers is the duly appointed, qualified and acting successor trustee of Ernest R. Crutcher, who was the original trustee in bankruptcy in this

proceeding, both of whom are referred to hereinafter as the trustee.

III.

Heretofore, pursuant to authority granted by this Court, the trustee instituted an action against petitioner in the Superior Court of the State of Washington, in and for the County of Franklin, entitled "Ernest R. Crutcher, as trustee, plaintiff, vs. Scott Publishing Company, Inc., a corporation, defendant," which said cause is No. 7314 of the records of the Clerk of said Court, and after judgment had been entered in said action an appeal was taken to the Supreme Court of the State of Washington, and said cause is numbered 32161 in the Supreme Court.

IV.

The action brought by the trustee in the Franklin County Superior Court was one for the conversion of property belonging to the bankrupt estate herein. Included in the property for which the trustee sought recovery of the value thereof was a Model 1934 Mergenthaler Linotype machine, hereinafter referred to as a "linotype" or "linotype machine," claimed by the trustee to be the property of the bankrupt estate then and there in the possession of the defendant, who is the petitioner herein; that at the trial of said litigation it was stipulated, as appears at page 183 of the Statement of Facts (petitioner's Exhibit 3), that Kennewick Printing Company, which was the previous name of the corporation, Mid-Columbia Publishers, Inc., the

bankrupt, had given a note and chattel [32] mortgage to Mergenthaler Linotype Company; that at page 632 of said Statement of facts (petitioner's Exhibit 3), it was stipulated that the balance owing on said linotype on June 11, 1949, which was the date of the alleged conversion, was \$8,550.00; that prior to the commencement of said action in the Franklin County Superior Court, the trustee sought to recover possession of said linotype but his demands for possession, which were made upon the petitioner, were refused; that the trustee elected to sue in conversion for the value of the machine.

V.

Approximately a year and half prior to the trial of the Franklin County Superior Court action aforesaid, the petitioner assumed and agreed to pay to Mergenthaler Linotype Company the indebtedness aforesaid of \$8,550.00 which had been incurred by the bankrupt, but Mergenthaler Linotype did not then, or at any time thereafter, release or exonerate the bankrupt from liability on account of said indebtedness, but did accept and had accepted the petitioner as the obligor of such mortgage indebtedness. That the trustee did not at any time petition for or seek to sell the linotype machine either subject to or free from the lien of the mortgage. That the trial judge in the Franklin County action ruled during the trial as a matter of law that the trustee in that action could only recover the proven market value of the linotype machine, less the \$8,550.00 indebtedness thereon, and so instructed the jury. No

evidence was offered as to the sums of money which the petitioner had paid the Mergenthaler Linotype Company as of the date of trial of the Franklin County Superior Court action, which action was tried in March of 1952. As of May, 15, 1953, however, the petitioner had reduced said indebtedness to the sum of \$3,150. No evidence was offered by the petitioner at the trial of said Franklin County action to show the assumption of said indebtedness or what amounts, if any, it had paid Mergenthaler Linotype Company. [33]

VI.

All matters and things adduced at the hearing before this Court pertaining to the mortgage indebtedness owing to Mergenthaler Linotype Company by the bankrupt and the assumption agreement signed by the petitioner were known to the petitioner at the time of trial of said Superior Court action.

VII.

By judgment of the Superior Court in the action commenced by the trustee aforesaid, the full recovery of the value of said linotype (which was more than \$8,550.00, less the amount of the bankrupt's indebtedness owing on the purchase price thereof at the time and place of the alleged conversion, to wit, the sum of \$8,550.00), was granted to the trustee; that upon appeal of the said cause to the Supreme Court of the State of Washington, the judgment of the Superior Court in that respect was affirmed by the Supreme Court and, in addition thereto, the Supreme Court

of the State of Washington, by its decision and by its remittitur sent to said Superior Court, adjudged that the trustee was entitled to recover the full value of said linotype machine, without deduction for the indebtedness of \$8,550, and there was added to the original judgment of the Superior Court the sum of \$8,550. The trustee recovered from the petitioner the full amount of said judgment thus increased. The Supreme Court of the State of Washington filed an opinion which is reported in 142 Washington Decisions, page 80, and which by reference is incorporated in these Findings of Fact, the title of the action therein reported being designated as "Crutcher v. Scott Publishing Company, Inc."

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

1. The judgment of the Superior Court of Franklin County, Washington, as modified by the appeal to the Supreme Court of the [34] State of Washington, constitutes a final and conclusive adjudication of the rights of the trustee to recover for the conversion of said linotype.

2. The matters and things set forth in the petition of Scott Publishing Company, filed herein on April 25, 1953, were matters and things which could have been and should have been adjudicated and determined in the Franklin County Superior Court action aforesaid, and the judgment as rendered by the Superior Court of the State of Washington in

the proceedings hereinbefore referred to, constitute a final and complete adjudication of the rights of the parties in this proceedings.

3. The facts and allegations contained in the petition aforesaid of Scott Publishing Company, Inc., constitute collateral attacks upon a valid and subsisting judgment of the Superior Court of the State of Washington, for Franklin County, as affirmed and modified by the Supreme Court of the State of Washington.

4. The petitioner, having been adjudicated guilty of a wilfull tortious act and a wrongful tortious act, from which arises the claim asserted in its petition, does not come into court with clean hands and should be barred from equitable relief.

5. The petition aforesaid of Scott Publishing Company should be dismissed.

Wherefore, It Is Ordered, Adjudged and Decreed that the petition of Scott Publishing Company, Inc., filed herein on April 25, 1953, and verified on April 24, 1953, be and it is hereby dismissed, with prejudice, and it is ordered that the trustee recover his costs herein incurred.

/s/ MICHAEL J. KERLEY.

Referee in Bankruptcy. [35]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON REVIEW OF
REFEREE'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
DISMISSING PETITION OF SCOTT PUBLISHING COMPANY, INC.

It is the opinion of the Court, after reviewing the whole record submitted and after fully considering the arguments and authorities submitted by counsel, that the Referee's Findings of Fact, Conclusions of Law and Order should be approved and affirmed.

The doctrine of collateral estopped by judgment, being an application of the rule of *res judicata*, appears to be controlling in this case. In addition to the reasoning of the Referee, set forth in his opinion appearing in the record in support of his Findings of Fact, Conclusions of Law and Order, and authorities cited by the Referee and counsel for the Trustee, the following cases are cited in support of the Court's decision in this matter:

Partmar Corp. vs. Paramount Picture Theatre Corp., 347 U.S. 89;

Heiser vs. Woodruff, 327 U.S. 726;

Baltimore S.&S. Co. vs. Phillips, 274 U.S. 316;

Reed vs. Allen, 286 U.S. 191;

Deposit Bank vs. Frankfort, 191 U.S. 199;

Lester vs. National Broadcasting Company,
Inc., Court of Appeals, Ninth Circuit,
Decision No. 14,188, October 12, 1954;

Restatement, Restitution—Sec. 146, page 585.

An order in accordance therewith may be submitted upon notice.

WILLIAM J. LINDBERG,
United States District Judge.

In the District Court of the United States for the
Eastern District of Washington, Southern Division

In Bankruptcy No. B-1544

In the Matter of

MID-COLUMBIA PUBLISHERS, INC., a Corporation,

Bankrupt.

ORDER UPON REVIEW

The above matter having come on regularly for hearing before the above-entitled Court, the Hon. William J. Lindberg, District Judge, presiding, upon the petition of Scott Publishing Company, a corporation, for review of the Findings of Fact, Conclusions of Law, and the Order of the Hon. Michael

J. Kerley, Referee in Bankruptcy of the above-entitled Court, by virtue of which Findings, Conclusions and Order said Referee on March 3, 1954, denied the petition of said Scott Publishing Company, a corporation, for the disbursement to it of the sum of \$8,550.00, by the Trustee from the assets of the above bankrupt estate, and the Referee having filed the records of said proceedings in the above-entitled court, and the court having all of the records of the above-entitled bankrupt estate and the records of the proceedings sought to be reviewed before it, and having considered same, and the Trustee appearing by and through his counsel of record, Thomas Malott, and the petitioner appearing by its Executive Officer, Glenn Lee, and by one of its counsel of record, John Gavin, and argument of Counsel having been heard, and the Court having taken the matter under consideration, and having filed herein its Memorandum of Opinion on review in which the court concluded that the said Findings of Fact, Conclusions of Law, and Order of the Referee should be approved, and affirmed, and the court being now fully advised in the premises,

It is Hereby Ordered, Adjudged and Decreed that the Findings of Fact, Conclusions of Law, and Order of the Referee entered herein on March 3, 1954, upon the petition of the Scott Publishing [37] Company, a corporation, for the restitution of the sum of \$8,550.00 from the assets of the bankrupt estate, shall be and the same hereby are approved and affirmed and

It Is Further Ordered, Adjudged and Decreed that the petitioner, Scott Publishing Company, shall be and it hereby is allowed an exception to this order.

Dated this 19th day of February, 1955.

WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

THOMAS MALOTT,
Attorney for Trustee.

Approved as to Form:

JOHN GAVIN,
Of Counsel for Petitioner,
Scott Publishing Company.

[Endorsed]: Filed May 5, 1955. [38]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT

Upon the appeal of this case the appellant will rely upon and urge the following points:

1. The petitioner, Scott Publishing Company, is entitled to restitution of the sum of \$8,550 from the bankrupt estate on the grounds that the bankrupt estate has been unjustly enriched to that extent at the expense of the petitioner.

2. The Scott Publishing Company is not barred from obtaining equitable relief in these proceedings.

3. The judgments of the courts of the State of Washington are not *res adjudicata* of the right of Petitioner to restitution from the Trustee for unjust enrichment of the bankrupt estate.

4. These proceedings involve matters which were not, could not and should not have been adjudicated and determined by the proceedings in the state court.

5. These proceedings are not a collateral attack on a valid judgment of the courts of the State of Washington, but a separate equitable proceeding to obtain restitution by reason of unjust enrichment of the bankrupt estate.

GAVIN, ROBINSON &
KENDICK,

Attorneys for Petitioner and Appellant, Scott Publishing Company, Inc., a Corporation.

Affidavit of Mail attached.

[Endorsed]: Filed May 5, 1955. [39]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed

hereto are the originals filed in the above cause, called for in Appellant's Designation filed on May 5, 1955.

Order on Review of February 21, 1955, filed 2/21/55.

Notice of Appeal, filed 3/17/55.

Bond for Costs on Appeal, filed 3/17/55.

Affidavit of Mailing Notice and Bond, filed 3/17/55.

Stipulation and Order Extending Time, filed 4/16/55.

Agreed Statement on Appeal Pursuant to Rule 76, filed 5/5/55.

Statement of Points to Be Relied Upon by Appellant, filed 5/5/55.

Affidavit of Mailing, filed 5/5/55.

Designation of Contents of Record on Appeal, filed 5/5/55.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said district this 6th day of May, 1955.

[Seal] STANLEY D. TAYLOR,
Clerk.

By /s/ THOMAS GRANGER,
Deputy.

[Endorsed]: No. 14759. United States Court of Appeals for the Ninth Circuit. Scott Publishing Company, a Corporation, Appellant, vs. Ralph Rodgers, Trustee in Bankruptcy of Mid-Columbia Publishers, Inc., Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed May 9, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Case No. 14759

SCOTT PUBLISHING CO.,

vs.

RALPH RODGERS, Etc.

STATEMENT OF POINTS AND DESIGNA-
TION UNDER RULE 17, SUBDIVISION 6

In compliance with Rule 17, Subdivision 6 of the rules of the above-entitled Court, the appellant herewith adopts the Statement of Points filed in the United States District Court for the Eastern District of Washington, Southern Division, as the Statement of Points upon which it intends to rely in this appeal.

In further compliance with said rule the appellant designates, as that portion of the record which is material to the consideration of this appeal, all the certified record on appeal which is filed in this Court.

Dated this 12th day of May, 1955.

/s/ JOHN GAVIN,

Of Attorneys for Appellant Scott Publishing Com-
pany, Inc., a Corporation.

Affidavit of Mail attached.

[Endorsed]: Filed May 16, 1955.



IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

SCOTT PUBLISHING COMPANY, a Corporation,

Appellant,

vs.

RALPH RODGERS, Trustee in Bankruptcy
of Mid-Columbia Publishers, Inc., Bank-
rupt,

Appellee.

No. 12232

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

JOHN GAVIN
GAVIN, ROBINSON & KENDRICK
Attorneys for Appellant

Miller Building
Yakima, Washington

FILED

AUG -8 1955

PAUL P. O'BRIEN, CLERK



SUBJECT INDEX

	Page
STATEMENT AS TO JURISDICTION.....	1
STATEMENT OF THE CASE.....	1
SPECIFICATIONS OF ERROR.....	8
ARGUMENT OF THE CASE.....	9
Summary of Argument.....	9
1. Right of Petitioner to Restitution.....	10
2. Petitioner is not Barred from Equitable Relief..	18
3. The Judgments of the State Courts are not Res Adjudicata of the Rights of Petitioner.....	21
4. These Proceedings do not Involve Matters Which Could and Should Have Been Adjudicated in the State Courts.....	21
5. These Proceedings are not Collateral Attacks on the Judgment of the State Court.....	21
CONCLUSION	34

TABLE OF CASES

Adams v. Pearson, 104 N. E. 2d 267 (Ill.).....	32
Bailis v. Reconstruction Finance Corporation, 128 F. 2d 857.....	16
Baltimore S & S Co. v. Phillips, 274 U. S. 316.....	28
Bill v. Gattavara, 209 P. 2d 457, 34 Wash. 2d 745.....	18
Commissioner v. Sunnen, 333 U. S. 591, 92 L. ed., 898, 68 S. Ct. 715.....	24
Commissioner v. Texas-Empire Pipe Line Co., 176 F. 2d 523.....	26
Cromwell v. County of Sac., 94 U. S. 351.....	27
re di Carlo, 44 P. 2d 562, 3 Calif. 2d 225.....	32
Deposit Bank v. Frankfort, 191 U. S. 499.....	28
Gensinger v. Commissioner, 208 F. 2d 576.....	25

	Page
Heiser v. Woodruff, 327 U. S. 726.....	28
Lester v. National Broadcasting Company, Inc., Court of Appeals, Ninth Circuit, 217 F. 2d 399.....	28
Lipman, Wolfe & Co., v. Phoenix Assur. Co., Limited, 258 F. 544.....	14
Matarese v. Moore-McCormick Lines, 158 F. 2d 631....	17
Mercoid Corporation v. Mid-Continent Investment Company, 320 U. S. 661, 88 L. ed. 376.....	31
Oklahoma v. Texas, 256 U. S. 70, 65 L. ed. 831, 41 S. Ct. 420.....	27
Partmar Corp. v. Paramount Picture Theatre Corp., 347 U. S. 89.....	28
Rankin v. Emigh, S. Ct. 218 U. S. 27, 54, L. ed. 915.....	13
Reed v. Allen, 286 U. S. 191.....	28
Spilker v. Hankin, 188 F. 2d 35.....	32
Stone v. White, 301 U. S. 522, 81 L. ed. 1265, 57 S. Ct. 851.....	13
Syms v. McRitchie, 187 F. 2d 915.....	25
Taylor v. Merrill, 104 F. 2d 710.....	16
U. S. v. International Building Company, 345 U. S. 502, 97 L. ed. 1182, 72 S. Ct. 897.....	27
Walsh v. Wolff, 201 P. 2d 215, 32 Wash. 2d 285.....	30

TABLE OF STATUTES AND TEXTS CITED

19 Am. Jur., Equity, Section 473, page 327.....	19
50 C. J. S., Judgments, Section 592, page 11.....	30
77 C. J. S., Restitution, page 32.....	12
Restatement of Restitution, Chapter 1, Section 1.....	17
11 U.S.C.A. 11, Section 2.....	1
11 U.S.C.A. 47, 48, Sections 24, 25.....	1

IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

SCOTT PUBLISHING COMPANY, a Corporation,

Appellant,

vs.

RALPH RODGERS, Trustee in Bankruptcy
of Mid-Columbia Publishers, Inc., Bank-
rupt,

Appellee.

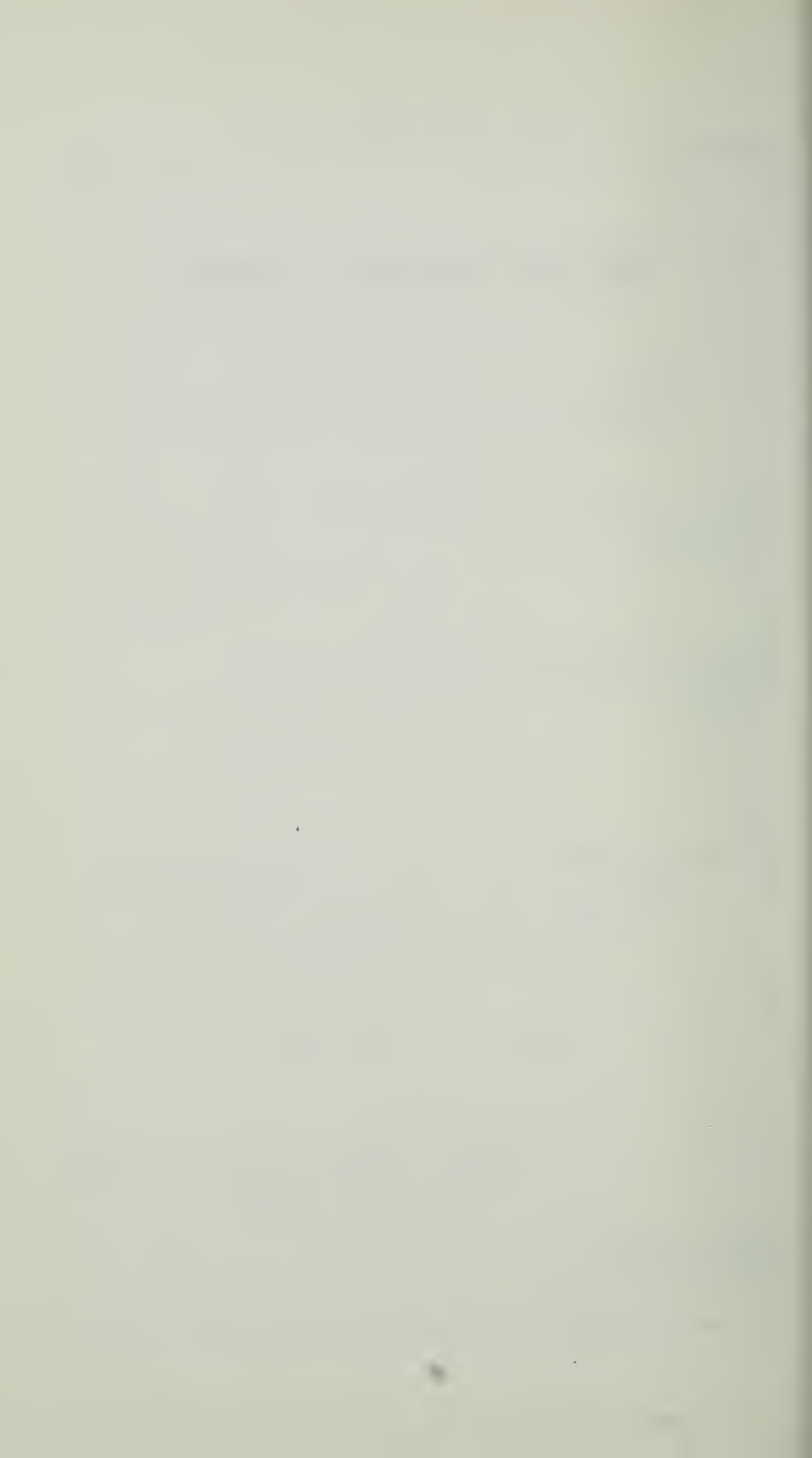
No. 12232

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

JOHN GAVIN
GAVIN, ROBINSON & KENDRICK
Attorneys for Appellant

Miller Building
Yakima, Washington



STATEMENT AS TO JURISDICTION

This is an appeal to this court from an Order and Judgment of the United States District Court for the Eastern District of Washington, Southern Division, sitting as a bankruptcy court (R. 5). The Order and Judgment of that court is one affirming an Order of the Referee in Bankruptcy for the District upon review (R. 3-4). The jurisdiction of the District Court accordingly arises out of a bankruptcy matter, of which such court has jurisdiction by reason of the provisions of The National Bankruptcy Act, particularly Section 2 thereof, 11 U.S.C.A. 11. This court has appellate jurisdiction by reasons of Sections 24 and 25 of the Act. 11 U.S.C.A. 47, 48. The Order appealed from was filed on February 21, 1955, and Notice of Appeal was filed on March 17, 1955, and a Bond for Costs on Appeal was filed on the same date (R. 5, 6-11).

STATEMENT OF THE CASE

Mid-Columbia Publishers, Inc., formerly Kennewick Printing Co., Inc., was a corporation organized under the laws of the State of Washington, engaged in the business of publishing a weekly newspaper in Kennewick, Washington, in 1949 (R. 13, 24-25). At the same time, the Scott Publishing Company was also engaged in the publishing of a daily newspaper at Kennewick, Washington. Mid-Columbia was engaged in the purchase of the equipment and business of the newspaper which they were

publishing from one Ralph Reed, who had originally sold the newspaper and its equipment under a contract of conditional sale (R. 23-24). Mid-Columbia was in desperate financial straights in June of 1949, and was unable to make the contract payment due on June 1, 1949, and was unable to meet the pay roll due the employees (R. 25). On June 11, 1949, a meeting of those financially interested in the Mid-Columbia Publishers was held, and Reed attended the meeting. Reed claims that he came away from the meeting without committing himself to the people there in any way, and so convinced of his insecurity that he effected a repossession of his newspaper plant and equipment by advising those in possession thereof of the repossession that same evening (R. 26). Other parties interested in the matter denied that Reed made this repossession, and, in fact, testified that he agreed to extend the time for the making of the payment (R. 25-27). In any event, later the same evening, Reed approached Glenn C. Lee,, one of the officers of Scott Publishing Company, representing that he had repossessed his property, and offering to sell it to Lee and the Scott Publishing Company. Lee agreed to purchase the property and an instrument was drawn up that evening covering the transaction. Scott Publishing Company agreed to pay \$15,000.00 for the property of the weekly newspaper, and made a down payment at that time (R. 25-28).

The following day representatives of the Scott Publishing Company physically took possession of the plant, which included among other properties, a certain Model 34 Mergenthaler Linotype machine, which is now involved in this litigation (R. 29, 14).

It will be seen from a recital of the foregoing facts that there was a conflict among the people concerned as to what occurred on the evening of June 11, 1949. The Scott Publishing Company either purchased a newspaper plant and business for \$15,000.00, which was then owned by the seller, Reed, without any interest remaining in the Mid-Columbia Publishers, or Scott Publishing Company simply bought a contract which was not yet in default by reason of the fact that Reed had extended the time for payment (R. 29). On the date to which payment was claimed to have been extended, Mid-Columbia tendered the contract payment to Scott Publishing Company; it declined to accept it (R. 29).

Thereafter the Mid-Columbia Publishers were adjudicated bankrupt and one Ernest Crutcher was appointed Trustee for the bankrupt corporation. His successor, Ralph Rodgers, is the appellee in this court. The Trustee, Crutcher, in due course commenced an action in the Superior Court of the State of Washington in and for Franklin County against the Scott Publishing Company, alleging that it had wrongfully converted the assets of the

bankrupt corporation (R. 13). This action came on for trial before a jury in Franklin County, Washington, and among other properties which were the subject matter of that litigation, was the Model 34 Mergenthaler Linotype machine previously mentioned (R. 14). This machine had been purchased by the Kennewick Printing Company from the Mergenthaler Linotype Company, which held a mortgage upon the equipment to secure the payment of the balance of the purchase price (R. 14). It is conceded and stipulated between the parties to that litigation that there was a balance due upon this mortgage to the Mergenthaler Company in the sum of \$8,550.00 at the time of the alleged conversion of the machine (R. 14). It was found by the jury that the Mergenthaler machine had a market value of approximately \$14,000.00 (R. 15). During the course of the trial in Franklin County Superior Court, the Trustee in bankruptcy contended that if this property was found to have been converted, he was entitled to recover from the Scott Publishing Company the market value of the machine, without any deduction therefrom for the amount of mortgage indebtedness due. The Scott Publishing Company, on the other hand, contended that if the property was found to have been converted, it could only be held liable for the difference between the market value and the sum of \$8,550.00 due upon the valid and existing mortgage indebtedness to the Mergenthaler Company. During the course of the

trial, the trial judge, the Honorable Richard B. Ott, now a Judge of the Supreme Court of the State of Washington, ruled that if the Scott Publishing Company was to be held liable with respect to the Mergenthaler machine, it could only be held liable for the difference between the market value and the mortgage indebtedness due, and he so instructed the jury (R. 14, 41). It thus became unnecessary for Scott Publishing Company to offer evidence to establish that it had, in fact, assumed and agreed to pay the mortgage indebtedness to Mergenthaler, and that it was doing so. The jury returned a verdict against the Scott Publishing Company finding it had converted the property, and among other items of recovery allowed a sum representing the difference between the value of the linotype machine and the mortgage indebtedness due thereon. Judgment was entered and both parties appealed. The Trustee in bankruptcy cross-appealed on the grounds that the trial court had committed error in permitting him to recover only the difference between the market value and the indebtedness due upon the Mergenthaler machine. In other words, he cross-appealed to have the amount of \$8,550.00 added to the amount of his recovery (R. 15). The appeal was heard by the Supreme Court of the State of Washington which handed down an opinion affirming the Judgment against the Scott Publishing Company and sustaining the cross-appeal of the Trustee, and thus adding to the amount of his recovery the sum of

\$8,550.00 (R. 15-16). A petition for rehearing was denied and Judgment was entered upon the remittitur of the Supreme Court; the Scott Publishing Company then paid the entire Judgment, including the sum of \$8,550.00, which had been added to the recovery (R. 16).

Thereupon, Scott Publishing Company, as petitioner, filed a petition in these bankruptcy proceedings. then pending before the Referee, for the disbursement to it of the \$8,550.00 that it had been required to pay to the Trustee, alleging that the Trustee and the bankrupt estate was being unjustly enriched to that extent, since the Scott Publishing Company had assumed and agreed to pay the mortgage to Mergenthaler and was, in fact, making the payments thereon, and intended to make all payments thereon. The Scott Publishing Company further pointed out that it was being unfairly compelled to make double payment of the balance of the mortgage indebtedness, since it was compelled to pay the sum to the Mergenthaler Company upon its mortgage as well as to the Trustee in Bankruptcy who was thereby unjustly enriched, since the bankrupt estate had not assumed and was under no obligation to pay the mortgage indebtedness itself (R.16-17). A motion was made to dismiss the petition by the Trustee and the Trustee also answered the petition, generally alleging that the proceedings in the State court was *res adjudicata* as to such a petition. A reply was made to the answer of the Trustee, and the

matter was tried before the Honorable Michael J. Kerley, Referee in Bankruptcy of the District Court (R. 17).

By his Findings, Conclusion, and Order, the Referee held that the State court proceedings did constitute a final adjudication of the rights of the petitioner and were *res adjudicata* of the matters contained in its petition; that its petition constituted a collateral attack upon a valid judgment of the state court; that petitioner should be barred from equitable relief by reason of having converted the equipment; and that its petition should be dismissed (R. 43-49). This action of the Referee was duly reviewed by the United States District Court, Honorable William J. Lindberg, Judge, who approved and affirmed the Findings, Conclusions, and Order of the Referee. The District Judge, in his memorandum, stated generally that he felt that the doctrine of collateral estoppel by judgment, an application of the rule of *res adjudicata*, should be controlling in the case (R. 50-51). The District Court entered an Order approving and affirming the Referee under date of February 19, 1955, and the Scott Publishing Company has appealed to this Court (R. 51-52; 5-6).

The facts in the case are not disputed but have been stipulated by and between the parties pursuant to Rule 76 of the Federal Rules of Civil Procedure, and the foregoing statement with some additional necessary back-

ground, is a statement of facts intended to reflect the agreed statement contained in the record (R. 13-22).

SPECIFICATIONS OF ERROR

1. The District Court erred in confirming and approving by order the entire Findings of Fact, Conclusions of Law, and Order of the Referee on the basis that collateral estoppel by judgment controlled the case (R. 50-53).

2. The Referee erred in concluding, as a matter of law, that the state court judgments were a final and conclusive adjudication of the right of the Trustee to recover (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

3. The Referee erred in concluding, as a matter of law, that the matters and things here presented could have been litigated in the State court proceedings, and hence are barred (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

4. The Referee erred in concluding, as a matter of law, that these proceedings constitute a collateral attack on a valid State court judgment (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

5. The Referee erred in concluding, as a matter of law, that the appellant did not come into court with clean hands, and is barred from equitable relief (such conclusion

being necessarily approved by the District Court, as set forth in Specification 1 above).

6. The Referee erred in dismissing the petition of Scott Publishing Company (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

ARGUMENT OF CASE

Summary of Argument

The legal problems involved upon this appeal are set forth in the Agreed Statement of the Case, as follows:

- “1. Is the Scott Publishing Company, petitioner, entitled to restitution of the sum of \$8,550.00 from the bankrupt estate on the grounds that the bankrupt estate has been unjustly enriched to that extent at the expense of the petitioner?
- “2. Is the Scott Publishing Company, by reason of its conversion of the Mergenthaler linotype, in a position to obtain equitable relief in these proceedings?
- “3. Is the judgment of the Superior Court of Franklin County, Washington, as modified on appeal by the Supreme Court of the State of Washington, *res adjudicata* of the right of the petitioner to recover any sums from the Trustee by these proceedings?
- “4. Do these proceedings involve matters which could and should have been adjudicated and determined by the State court proceedings?
- “5. Do these proceedings constitute an attempted collateral attack upon a valid and subsisting judgment of the Superior and Supreme Courts of the State of Washington? (R. 19).

The argument of appellant may be summarized by stating that it is the position of the appellant upon this appeal with respect to each of the points involved as follows:

- "1. The petitioner, Scott Publishing Company, is entitled to restitution of the sum of \$8,550.00 from the bankrupt estate on the grounds that the bankrupt estate has been unjustly enriched to that extent at the expense of the petitioner.
- "2. The Scott Publishing Company is not barred from obtaining equitable relief in these proceedings.
- "3. The judgments of the courts of the State of Washington are not res adjudicata of the right of Petitioner to restitution from the Trustee for unjust enrichment of the bankrupt estate.
- "4. These proceedings involve matters which were not, could not and should not have been adjudicated and determined by the proceedings in the state court.
- "5. These proceedings are not a collateral attack on a valid judgment of the courts of the State of Washington, but a separate equitable proceeding to obtain restitution by reason of unjust enrichment of the bankrupt estate."

1. RIGHT OF PETITIONER TO RESTITUTION

It is manifest that a situation has arisen through no fault of the appellant which has resulted on the one hand, in the bankrupt estate obtaining \$8,550.00 to which it is not entitled, and on the other hand, the appellant twice paying an obligation of \$8,550.00 to its detriment. We

have here a clear case of unjust enrichment with the lower courts ruling that they are without right to remedy the injustice because of a belief that the restrictive doctrine of *res adjudicata* renders them powerless to remedy the situation.

It seems clear that there has been an unjust enrichment. Admittedly, the bankrupt estate did not assume, pay, or agree to pay the sum of \$8,550.00 that was due under the valid mortgage upon the Mergenthaler linotype machine. It is agreed that evidence was offered before the Referee that the Scott Publishing Company had assumed and agreed to pay the mortgage indebtedness and had, in fact, reduced it to the sum of \$3,150.00 at the time of the hearing before the Referee (R. 17). The Trustee in Bankruptcy did not dispute and does not dispute that this is the fact, but merely offered evidence that knowledge that it had assumed and agreed to pay the mortgage indebtedness and was paying same was possessed by Scott Publishing company at the jury trial of the conversion action but evidence to that effect was not offered (R. 17). Since there is no dispute but what the appellant has assumed, agreed to pay and has paid the mortgage indebtedness, and since it is agreed that it has also paid the sum of \$8,550.00 to the Trustee in satisfaction of the judgment, it is thus clear that an unjust enrichment has occurred and a double payment has been made by the appellant.

No matter whether the petition herein be termed an action for money received, or an action based upon quasi contract, or an action for restitution by reason of unjust enrichment, or whether it be legal or equitable, the general principles announced in the decisions clearly indicate that under the factual situation that here exists the petition is well founded and should be granted, and the funds restored to the petitioner. An excellent statement of the principles involved is found in 77 C.J.S., *Restitution*, Page 32, as follows:

“Restitution, in legal nomenclature, is an equitable principle, and is founded on the equitable maxim that he who seeks equity must do equity, and one of the grounds on which the doctrine is based is that when one person confers a benefit on another through mistake, whether of fact or law, the other is liable to make restitution. It is sometimes considered to be the modern designation for the older doctrine of quasi contracts.

“A cause of action for restitution is a type of the broader cause of action for money had and received, and generally the object to be attained in proceedings for restitution is the prevention of unjust enrichment of defendant and the securing for plaintiff of that to which he is justly and in good conscience entitled. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled. It has been said that restitution, properly speaking, is made only to a defendant whose money or property has been taken from him by the erroneous order of a court, and it is not available to third parties.

"It is not necessary, in order to create an obligation to make restitution, that the party unjustly enriched should have been guilty of any tortious or fraudulent act; the question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled? In such cases the simple, but comprehensive, question is whether the circumstances are such that equitably defendant should restore to plaintiff what he has received."

Mr. Justice White, speaking for the Supreme Court in *Rankin v. Emigh*, S. Ct. 218 U. S. 27, 54 L. Ed. 915, 30 S. Ct. 672, said:

"This court, without in any way questioning that the state court was correct in holding that the contract of guaranty was *ultra vires* of the national bank act, nevertheless affirmed the judgment below. Reviewing and commenting upon the rulings in *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; and *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 136, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, it was held although restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

At a later date, Mr. Justice Stone, speaking for the same court in *Stone v. White*, 301 U. S. 522, 81 L. ed. 1265,

57 S. Ct. 851, in connection with a tax recovery action, stated:

“The action, brought to recover a tax erroneously paid, although an action at law is equitable in its function. It is the lineal successor of the common count in *debitatus assumpsit* for money had and received. Originally an action for the recovery of debt, favored because more convenient and flexible than the common law action of debt, it has been gradually expanded as a medium for recovery upon every form of quasi-contractual obligation in which the duty to pay money is imposed by law, independently of contract, express or implied in fact. Ames, *The History of Assumpsit*, 2 *Harvard L. Rev.* 53; Woodward, *Quasi-Contracts*, §2.

“Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in *Moses v. Macferlan*, 2 *Burr.* 1005, 97 *Eng. Reprint*, 676 (K. B. 1760), have long been recognized in this Court. See *Nash v. Towne*, 5 *Wall.* 689, 702, 18 *L. ed.* 527, 530; *Gaines v. Miller*, 111 *U. S.* 395, 397, 28 *L. ed.* 466, 467, 4 *S. Ct.* 426; *Atlantic Coast Line R. Co. v. Florida*, 295 *U. S.* 301, 309, 79 *L. ed.* 1451, 1457, 55 *St. Ct.* 713.”

The doctrine has been uniformly announced and applied by the various Circuit Courts. In this Circuit in *Lipman, Wolfe & Co. v. Phoenix Assur. Co. Limited*, 258 *F.* 544, Judge Gilbert, speaking for this court, cited with approval the authorities, stating:

“The first question which arises is whether the com-

plaint states a cause of action. In *Carey v. Curtis*, 3 How. 236, 247 (11 L. Ed. 576), the court said:

“The action of assumpsit for money had and received, it is said by Lord Mansfield, Burr, 1012, *Moses v. MacFarlen*, will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton v. Rastall*, 2 T. R. 360, “that this action has been of late years extended on the principle of its being considered like a bill in equity, and therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity.”” These are the general grounds of the action as given from high authority.’

“In *Bither v. Packard*, 115 Me. 306, 312, 98 Atl. 929, 932, the court said:

“It is elementary law that, when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained. This form of action is comprehensive in its reach and scope, and though the form of proceeding is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored by the courts. It lies for money paid under protest, or obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid. Where the defendant is proved to have in his hands the money of the plaintiff which, ex aequo et bono, he ought to refund, the law conclusively presumes that he has promised to do so’ — citing *Mayo v. Purington*, 113 Me. 452, 455, 94 Atl. 935.

"To the same effect are *Gaines v. Miller*. 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; *Taylor v. Currey*, 192 Ill. App. 502; *Early v. Atchison, T. & S. F. Ry. Co.*, 167 Mo. App. 252, 149 S. W. 1170; *Cullen v. Sea Board Air Line*, 63 Fla. 122, 58 South, 182; *Knight v. Forbes*, 19 Ga. App. 320, 91 S. E. 445, in which the court said that such an action needs for its support no actual contractual relation, for the law will imply a quasi contractual relation to uphold it whenever the circumstances so require."

Judge Denman at a later date, speaking for this Court in *Taylor v. Merrill*, 104 F. 2d. 710, said:

"It is elementary that the basis of the action for money had and received, is that it is held by the defendant when in equity and good conscience it belongs to the plaintiff."

Typical statements of other Circuits in application of the principles of the case at Bar are as follows:

Judge Jones, speaking for the Third Circuit in *Bailis v. Reconstruction Finance Corporation*, 128 F. 2d 857, said:

"Unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to do or to forbear doing a particular thing. A quasi-contract does not arise out of a promise. See Restatement, Contracts (1932) §5. In fact it is imposed in direct opposition to the intention of the party charged therewith. Such contracts are the means which the law has adopted to raise up obligations in order to promote justice. See *Hertzog v. Hertzog*, 29 Pa. 465, 468; I Williston on Contracts (rev. ed. 1936) §3, pp. 7-10. Thus, one who is unjustly enriched at the expense of another may be required for that reason

alone to make restitution. Restatement, Restitution (1937) §1."

Judge Clark, speaking for the Second Circuit in *Matarese v. Moore-McCormick Lines*, 158 F. 2d. 631, said:

"The doctrine of unjust enrichment or recovery in quasi-contract obviously does not deal with situations in which the party to be charged has by word or deed legally consented to assume a duty toward the party seeking to charge him. Instead, it applies to situations where as a matter of fact there is no legal contract, but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another. *Miller v. Schloss*, 218 N. Y. 400, 407, 113 N. E. 337; *Byxhie v. Wood*, 24 N. Y. 607, 610; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *Oneida County v. First Citizens Bank & Trfst Co. of Utica*, 264 App. Div. 212, 35 N.Y.S. 2d 782; 1 Williston on ontracts, Rev. Ed. 1936; §3, p. 9. Where this is true the courts impose a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong. Restatement, Restitution, 1937, § 1(a); *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 152, 18 S. Ct. 808, 43 L. Ed. 108."

The right to restitution by reason of unjust enrichment is set forth in *Restatement of Restitution*, Chapter 1, Section 1, succinctly as follows:

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

Finally, the Supreme Court of Washington, the juris-

diction in which this case arose, has pronounced the applicable principles in the following language:

Bill v. Gattavara, 209 P. 2d. 457, 34 Wash. 2d. 645.

"A person should not be permitted unjustly to enrich himself at the expense of another. The obligation to do justice rests upon all persons; and if one obtains the property of another, or the proceeds of the property of another, without a right to do so, equity can, in a proper case, compel restitution or compensation. It is not necessary in order to create an obligation to make restitution or to compensate, that the party unjustly enriched should have been guilty of any tortious or fraudulent act. The question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?"

An examination of the cases reveals that the general principles announced have been applied to all conceivable factual situations, and the remedy by way of restitution for unjust enrichment is just as broad as any situation which gives rise to its application.

2. PETITIONER IS NOT BARRED FROM EQUITABLE RELIEF.

The only suggestion in the record which would bar the petitioner from obtaining restitution in this matter is the conclusion of the Referee that since the petitioner had been held liable for a wrongful and willful conversion that it does not come into court with clean hands and should be barred from any equitable relief (R. 49). The opinion of the Supreme Court of the State of Washington which

is made a part of the Agreed Statement of Facts by reference (R. 15), by way of dicta commented that the conversion was not an unintentional or inadvertent conversion (R. 36). It is clear from the opinion of the Supreme Court, however, that the Scott Publishing Company did no more than take physical possession of property which it had every right to believe that it had purchased. That it later discovered that conflicting claims were made to the property in question, and that it chose to keep possession in dependence upon the assumption that its seller, Reed, had made a valid sale to it, certainly does not establish that it was guilty of such conduct that it does not have "clean hands," certainly not to the extent that it should be denied restitution for a subsequent unjust enrichment at its expense which has occurred some years later and which arises out of an entirely different set of circumstances.

In any event,, the doctrine of "clean hands" has no applicability unless there is some reasonable connection between the conduct which disqualifies the litigant, and the transaction which would otherwise give it a right to equitable relief. As is stated in 19 *Am. Jur. Equity*, Section 473, Page 327:

"The applicability of the maxim, 'he who comes into equity must come with clean hands,' depends upon the connection between the complainant's iniquitous acts and the defendant's conduct which the com-

plainant relies upon as establishing his cause of action. Relief is not to be denied because of general iniquitous conduct on the part of the complainant or because of the latter's wrongdoing in the course of a transaction between him and a third person. In other words, the maxim may not be invoked by reason of acts which are not shown to have been connected with the transaction giving rise to the suit or otherwise to have been related to the defendant or anything in which he was interested. Where inequitable conduct is shown, the resulting disqualification extends only to the enforcement or equities which are founded upon the matter or transaction which the conduct involved. The question to be resolved is whether the complainant's wrongful conduct is connected with, or related to, the dispute between the complainant and the defendant and not whether the complainant has been guilty of wrongdoing from which he has benefited.

"The courts apply the maxim, 'not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice.'"

If the Scott Publishing Company was guilty of a conversion, it was a conversion accomplished pursuant to a purchase of the property from the man who represented himself to be the owner thereof, followed by the taking of physical possession of the property on June 12, 1949. This was followed on June 15, 1949 by a refusal of the defendant to release the property to those representing Mid-Columbia Publishers who were claiming that it had the right to possession of the property. Shall such conduct in June of 1949 be held to disqualify the Scott Publishing Company from the recovery of a sum paid to a Trustee in

bankruptcy some *years* later, and which has resulted in an unjust enrichment of the bankrupt estate? Although the acts in June of 1949 led to litigation out of which arose circumstances beyond the control of appellant resulting in the unjust enrichment of the bankrupt estate, that is not a sufficient connection to disqualify the appellant from asking equitable relief in these proceedings.

3. THE JUDGMENTS OF THE STATE COURTS ARE NOT RES - ADJUDICATA OF THE RIGHTS OF PETITIONER.
4. THESE PROCEEDINGS DO NOT INVOLVE MATTERS WHICH COULD AND SHOULD HAVE BEEN ADJUDICATED IN THE STATE COURTS.
5. THESE PROCEEDINGS ARE NOT COLLATERAL ATTACKS ON THE JUDGMENT OF THE STATE COURT.

The foregoing three points upon appeal will be discussed at the same time since they involve essentially the same problem.

The question of whether or not the decision and judgment of the courts of the State of Washington constitute a bar to the relief which petitioner seeks or whether this proceeding is a collateral attack upon those judgments, or whether or not these matters should and could have been litigated in the State court proceedings are all facets of the same problem—that is, does the doctrine of *res*

adjudicata or *estoppel by judgment* bar this petitioner from relief to which it would otherwise be clearly entitled?

It is submitted by the appellant that the proceedings in the State court are not decisive of its right to the return of the \$8,550.00 which it paid, thus unjustly enriching the bankrupt estate. It is further its contention on appeal that its clear right to restitution, as a matter of simple justice, should, in any event, override any considerations of policy which support the principle of *res adjudicata*. It is the position of the appellant that when a manifest injustice exists, courts should redress that injustice and provide a remedy, and not stand by helplessly and confess that their hands have been bound by a restrictive doctrine which prevents and does not promote the doing of justice between the parties.

Let us first consider the facts which allegedly support the application of *res adjudicata* to this controversy.

The State court proceedings out of which the judgment arose, and which is alleged to constitute a bar to these proceedings, was an action brought by the Trustee in bankruptcy against the Scott Publishing Company for conversion of physical property (R. 13). In the course of that action, an issue arose between the parties over the proper measure of damage in event a conversion was established. The ruling of the trial court to the effect that the mortgage indebtedness should be deducted from

the market value of any converted property in determining the measure of damage obviated the necessity of offering evidence upon that issue (R. 14). Accordingly, the question of whether or not Scott Publishing Company had assumed and agreed to pay and was paying the mortgage indebtedness *was not litigated*. In these proceedings the petitioner is seeking the recovery of monies by way of restitution after having paid same as a result of the reversal of the trial court by the appellate court in the State of Washington. The issue of assumption and payment of the mortgage indebtedness by Scott Publishing Company is pleaded and directly involved in these proceedings; evidence was offered that such assumption and payment was and is the fact, and that is not controverted by the Trustee; the Trustee simply claims that evidence on such an issue was known to Scott Publishing Company and *could have been presented and litigated* in the State court proceedings (R. 17).

In the first place, it is submitted that such an issue could not have been litigated in the State court proceedings because the ruling of the trial court eliminated the necessity of offering any evidence on the point, and, indeed, if it had been offered after such a favorable ruling, it would properly have been rejected as being irrelevant and immaterial. Nevertheless, even if it be said that it *could have been litigated*, that does not constitute *res ad-*

judicata or estoppel by judgment against the petitioner in these proceedings.

The distinction between *res adjudicata* and *estoppel by judgment* has been authoritatively laid down by the Supreme Court of the United States in *Commissioner v. Sunnen*, 333 U. S. 591, 92 L. Ed. 898, 68 S. Ct. 715. In that case, the opinion of Mr. Justice Murphy stated:

“It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound ‘not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.’ *Cromwell v. Sac County*, 94 U. S. 351, 352, 24 L. ed. 195, 197. The judgment puts an end to the cause of action which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See von Moschzisker, ‘*Res Judicata*,’ 38 Yale L. J. 299, Am. L. Inst. Restatement, Judgments, §47, 48.

“But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to

those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. Sac County*, *supra* (94 U. S. 353, L. ed. 198). And see *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Southern P. R. Co. v. United States*, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 S. Ct. 18; *Mercoid Corp. v. Mid-Continent Invest. Co.*, 320 U. S. 661, 671, 88 L. ed. 376, 384, 64 S. Ct. 268. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be re-litigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Am. L. Inst. Restatement, Judgments, § § 68, 69, 70; Scott, "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1."

The *Sunnen case*, *supra*, was cited with approval by Judge Bone of this court in *Gensinger v. Commissioner*, 208 F. 2d 576. The doctrine of the *Sunnen case*, *supra*, has been followed in nearly all of the Circuit courts. A typical example of the application of the principle is found in *Syms v. McRitchie*, a decision of the United States Court of Appeals, Fifth Circuit, 187 F. 2d, 915, in which Judge Strum said:

"The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand, or upon a different claim or demand. In the

former case, a judgment upon the merits is an absolute bar to a subsequent action, not only with respect to matters determined in the former suit, but also with respect to every matter which might have been litigated to sustain or defeat the claim. In the latter case, the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the prior action. *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Kelliher v. Stone & Webster*, 5 Cir., 75 F. 2d. 331; *Troxell v. Delaware, L. & W. R. R. Co.*, 227 U. S. 434, 33 S. Ct. 274, 57 L. ed. 586; *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 53 S. Ct. 706, 77 L. ed. 1405.

“It is of the essence of estoppel by judgement that it be certain that the precise issue raised in the second suit was determined by the former judgment. *Commissioner of Internal Revenue v. Sunnen*, 333 U. S. 591, 68 S. Ct. 715, 92 L. ed. 898. If there be any uncertainty in the record as to whether it was so determined, the whole subject matter of the second action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point to have been involved and determined in the former action. *De Sollar v. Hanscome*, 158 U. S. 216, 15 S. Ct. 816, 39 L. ed. 956.”

In *Commissioner v. Texas-Empire Pipe Line Co.*, 176 F. 2d 523, a decision of the United States Courts of Appeal for the Tenth Circuit, the opinion of Judge Murrah follows the principles laid down in the *Sunnen case*, *supra*.

It is apparent that we have in these proceedings an action in which the exact point was not litigated in the State court proceedings. The question here involved, although between the same parties, does not arise “upon

the same claim or demand" as in the State court proceedings, but "upon a different claim or demand." In such a situation, the judgment of the courts of the State of Washington is not a bar to these proceedings, even if it could be said that the point *might* have been litigated therein.

The Supreme Court of the United States, in *Oklahoma v. Texas*, 256 U. S. 70, 65 L. ed. 831, 41 S. Ct. 420, stated:

" . . . But we concede that, in a subsequent suit upon a different cause of action, the question whether the matter decided on the former occasion was within the issues then proper to be decided, or was presented and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative, the matter is not res judicata."

Mr. Justice Douglas, speaking for the Supreme Court in *U. S. v. International Building Company*, 345 U. S. 502, 97 L. ed 1182, 72 S. Ct. 897, quoted from *Cromwell v. County of Sac*, 94 U. S. 351, as follows:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and deter-

mined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The cause of action asserted by the appellant in these proceedings has never been previously litigated. It is not barred from the proceedings by reason of *res adjudicata*, nor is petitioner estopped by judgment, nor is the proceeding a collateral attack upon a judgment.

The District Judge in his memorandum cited the following cases in support of his conclusion that the doctrine of estoppel by judgment was applicable:

Partmar Corp. v. Paramount Picture Theatre Corp., 347 U. S. 89;

Heiser v. Woodruff, 327 U. S. 726;

Baltimore S & S Co. v. Phillips, 274 U. S. 316;

Reed v. Allen, 286 U. S. 191;

Deposit Bank v. Frankfort, 191 U. S. 499;

Lester v. National Broadcasting Company, Inc., Court of Appeals, Ninth Circuit, 217 F. 2d. 399 (R. 50-51).

In each of the cases the identical cause of action which had been previously litigated between the identical parties was again brought, and necessarily the courts concluded that the second proceeding was barred by reason of the entry of judgment in the first. Here we do not have the same cause of action involved in these proceedings as in the State court proceedings. In fact, no cause of action at all was being asserted by Scott Publishing Company

in the State court proceedings. The distinction appears quite clearly in the case of *Baltimore S. & S. Co. v. Phillips*, *supra*. An action was there brought by an infant against the United States and a steamship company for injuries sustained in an accident by the infant while employed on a vessel. A recovery was made in the Federal District Court. Subsequently, the same plaintiff brought an action arising out of the same accident against the same company for other items of damage. The court said:

“The effect of a judgment or decree as *res adjudicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered. *Cromwell v. Sac County*, 94 U. S. 351-353, 24 L. ed. 195, 197, 198; *United States v. Moser*, 266 U. S. 236, 241, 69 L. ed. 262, 264, 45, Sup. Ct. Rep. 66. There is some confusion in the decisions as to whether the present case should fall within the first or the second branch of the rule, but we are of the opinion that the great weight of authority, both in respect of the number of decisions and upon reason, sustains the view that the facts here gave rise to a single cause of action for damages and that the first branch of the rule applies.”

In the case at bar the second branch of the foregoing rule would apply, and the petitioner is not foreclosed from having its action for restitution determined upon its merits.

The four generally recognized requirements for the application of the doctrine of *res adjudicata* are set forth in the case of *Walsh v. Wolff*, 201 P. 2d. 215, 32 Wash. 2d. 285, as follows:

“To make a judgment *res adjudicata* in a subsequent action there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.”

There is no identity of either subject matter or cause of action in this proceeding which would render the doctrine of *res adjudicata* applicable.

Finally, consideration should be given to the underlying policy for applying the doctrine of *res adjudicata* to any case. Those principles are set forth in 50 C.J.S., Judgments, Section 592, Page 11, as follows:

“Res judicata is a rule of universal law pervading every well regulated system of jurisprudence, and is put on two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation—interest republicae ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for the same cause—nemo debet bis vexari pro eadem causa. The doctrine applies and treats the final entire subject of

the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided.

“The doctrine should receive a liberal construction, and should be maintained and applied without technical restrictions. On the other hand, the doctrine should not be applied so rigidly as to defeat the end of justice.”

It is clear that the Trustee in bankruptcy is not being vexed twice by the same claim. The Trustee in bankruptcy has never previously had to defend this claim, nor other than in these proceedings. It is difficult to see that public policy would require an end to his litigation when it has actually never been previously decided. On the other hand, we have a situation in which an injustice will be done if the doctrine of *res adjudicata* or estoppel by judgment is applied in this case. Some courts have not hesitated to override the doctrine when its application would defeat rather than promote the ends of justice. In *Mercoid Corporation v. Mid-Continent Investment Company*, 320 U. S. 661, 88 L. ed. 376, the court, speaking through Mr. Justice Douglas, did not hesitate to cast aside *res adjudicata* in a case in which its application would have promoted injustice rather than to accomplish the purpose for which *res adjudicata* was designed. A comment note follows that case, and is cited at 88 L. ed. 389. The comment states:

“It should be observed that in most cases recognizing on grounds of public policy, an exception to the rules of *res adjudicata*, the controversy or issue which under the general rules would have been concluded by a former judgment has not been actually litigated and determined by such judgment.”

This case definitely falls within that principle.

Other cases in which the courts did not hesitate to criticize the curious result which *res adjudicata* would produce are *Adams v. Pearson*, 104 N. E. 2d 267 (Ill.), and *re di Carlo*, 44 P. 2d 562, 3 Calif. 2d 225. In *Spilker v. Hankin*, 188 F. 2d 35, a decision of the United States Court of Appeals, District of Columbia Circuit, the action involved a suit by an attorney to recover upon certain notes given to him in payment of services. Certain equitable defenses, such as coercion, duress, and want of consideration were interposed by way of defense, and it was claimed that such could not be raised because the same had been previously litigated between the parties in a suit on another note. The court held that all of the elements of *res adjudicata* were present, but that the overriding policy of carefully scrutinizing contracts between an attorney and client necessitated a holding that *res adjudicata* should not properly be applied. The court there said:

“The doctrine of *res adjudicata* is but the technical formulation of the “Public policy * * * that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered for-

ever settled as between the parties. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U. S. 522, 525, 51 S. Ct. 517, 518, 75 L. ed. 1244. This policy has long been a tenet of the common law, and even finds expression in the Constitution of the United States, in the full faith and credit clause. Experience has taught that as a general rule there is no reason why the doctrine of *res adjudicata* 'should not apply in every case where one voluntarily appears, presents his case and is fully heard * * * ."

"But rules and policies such as these must be weighed against competing necessities: situations may arise which call for exceptions. Recently this court decided a case involving such a situation, and held that "Where the application of the judicial doctrine *res adjudicata* would be inconsistent with the method devised by Congress the doctrine will not be enforced by the courts. *Kalb v. Feuerstein*, 1940, 308 U. S. 433, 444, 60 S. Ct. 343, 84 L. Ed. 370. It is for this reason we hold against the contention of petitioners, and not because of lack of any of the elements which usually make out a case for the application of *res judicata*. The doctrine is not to be used where the circumstances create a semblance of conditions for its application but to apply it would submerge the plan of Congress for the administration and enforcement of its policy." *Denver Building & Construction Trades Council v. N. L. R. B.*, 87 U. S. App. D. C. 293, 186 F. 2d 326, 332.

"Other policies, not embodied in a congressional mandate, have compelled the same result. For example, while the courts of this country, as a general rule, have given *res judicata* effect to judgments of foreign countries, there have been situations where American courts have refused such recognition for policy reasons. Decisions of this sort demonstrate that *res judicata*, as the embodiment of a public policy, must,

at times, be weighed against competing interests, and must, on occasion, yield to other policies.”

In this case, *res adjudicata* or judgment by estoppel should not be used to foster an unjust result.

CONCLUSION

In conclusion, the appellant submits that it is entitled to restitution of the \$8,550.00 which it paid to the Trustee in bankruptcy. It has had to pay that sum twice. The Trustee in bankruptcy has been enriched to the extent of \$8,550.00, and the bankrupt estate has received an asset for distribution to which it was not entitled, and which it never expected to receive. The administration of the bankrupt funds is a function of the court. A court (perhaps even more than a private institution) should be most zealous in seeing that such an arm of the court does not receive funds to which it is not in justice entitled at the expense of another. The doctrine of *res adjudicata* or estoppel by judgment has no application to these proceedings for the reasons set forth. The District Court and the Referee in Bankruptcy should be reversed with instructions that the Trustee in Bankruptcy be ordered to disburse the sum of \$8,550.00 to the appellant from funds of the bankrupt estate.

Respectfully submitted,

JOHN GAVIN
GAVIN, ROBINSON & KENDRICK
Attorneys for Appellant
Scott Publishing Company

IN THE
UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

SCOTT PUBLISHING COMPANY, a corpora-
tion,

Appellant,

vs.

RALPH RODGERS, Trustee in Bankruptcy
of Mid - Columbia Publishers, Inc.,
Bankrupt,

Appellee.

No. 14,759

BRIEF OF APPELLEE

*Upon Appeal From the United States District Court
For the Eastern District of Washington
Southern Division.*

THOMAS MALOTT,
Attorney for Appellee.

708 Spokane and Eastern Building
Spokane 1, Washington

FILED

AUG 2 1955



IN THE
UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

SCOTT PUBLISHING COMPANY, a corporation,
Appellant,

vs.

RALPH RODGERS, Trustee in Bankruptcy
of Mid - Columbia Publishers, Inc.,
Bankrupt, *Appellee.*

No. 14,759

BRIEF OF APPELLEE

*Upon Appeal From the United States District Court
For the Eastern District of Washington
Southern Division.*

THOMAS MALOTT,
Attorney for Appellee.

708 Spokane and Eastern Building
Spokane 1, Washington

TABLE OF CASES

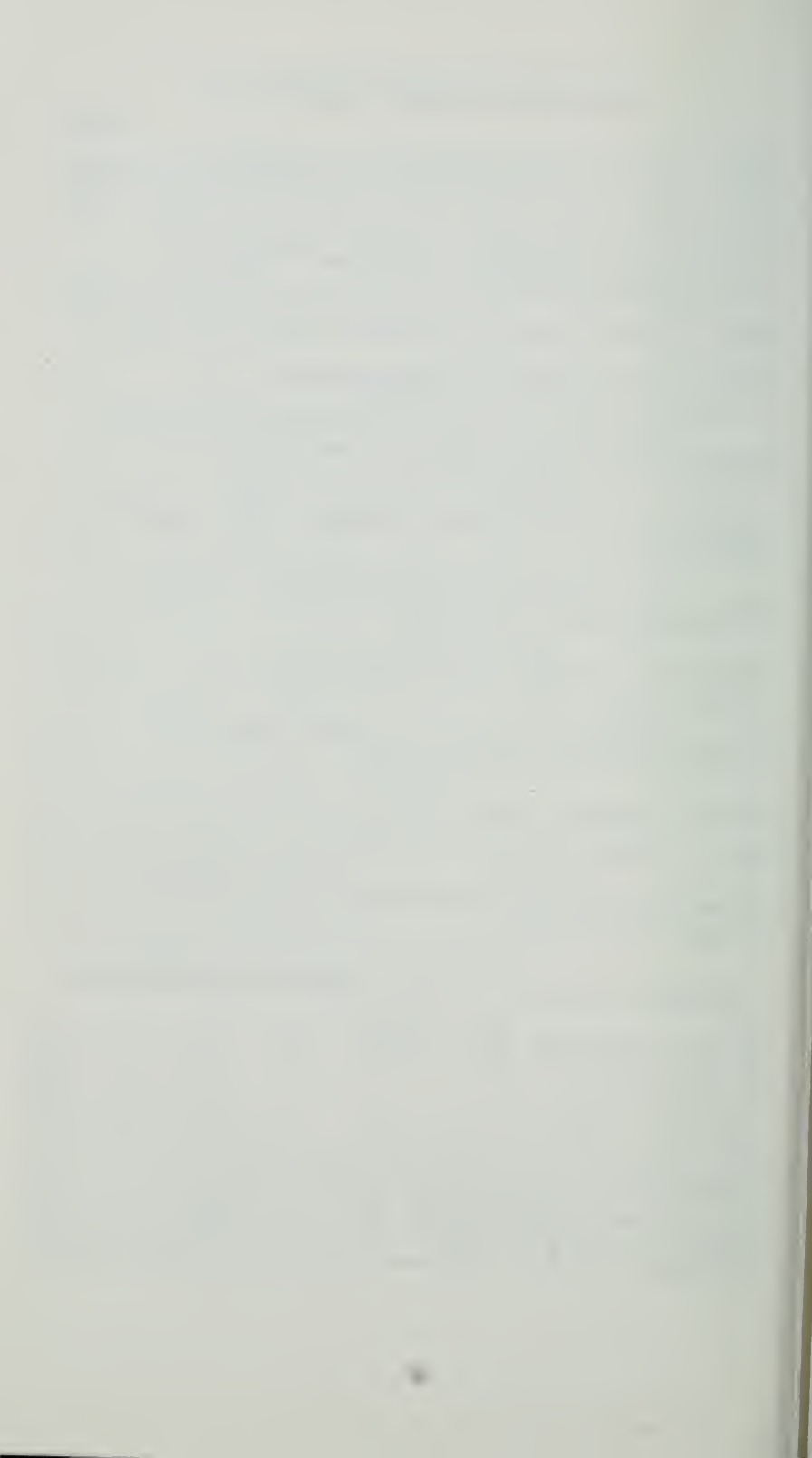
	Page
<i>Anderson v. National Bank of Tacoma</i> , 146 Wash. 520; 264 Pac. 8	13
<i>Anderson v. Peterson</i> , 147 Wash. 698; 265 Pac. 1118.....	13
<i>Baker v. Cummings</i> , 181 U. S. 118; 45 L. Ed. 776; 21 S. Ct. 578	13
<i>Baskin v. Livers</i> , 181 Wash. 370; 43 P. (2d) 42	11
<i>Campbell River Mills Co. v. Chicago, Milwaukee St. Paul and Pacific R. R. Co.</i> , 42 F. (2d) 775	10
<i>Caterpillar Tractor Co. v. International Har- vester Co.</i> , 120 F. (2d) 82; 138 ALR 1	26
<i>Commissioner v. Sunnen</i> , 333 U.S. 591; 92 L. Ed. 898; 68 S. Ct. 715	13
<i>Crutcher v. Scott Publishing Co.</i> , 42 Wn. (2d) 89, 253 P. (2d) 925	24, 26
<i>Curtis v. Crooks</i> , 190 Wash. 43; 66 P. (2d) 1140	16
<i>Fisher v. Schwabacher Hardware Co.</i> , 109 Wash. 257; 186 Pac. 649	11
<i>Hawkins v. Reber</i> , 81 Wash. 79; 142 Pac. 432	12
<i>Holt Manufacturing Co. v. Coss</i> , 78 Wash. 39; 138 Pac. 322	18
<i>Judish v. Rovig Lumber Co.</i> , 128 Wash. 287; 222 Pac. 898	12
<i>Kellogg v. Maddocks</i> , 1 Wash. T. 407.....	12
<i>Kennett v. Yates</i> , 45 Wn. (2d) 35; 272 P. (2d) 22	15
<i>MacPherson Bros. Co. v. Okanogan County</i> , 61 Wash. 239; 88 Pac. 199	12
<i>Merz v. Mehner</i> , 67 Wash. 135; 106 Pac. 1118	12
<i>Metropolitan Life Ins. Co. v. Davies</i> , 2 Wn. (2d) 155; 97 P. (2d) 686	13

TABLE OF CASES—(Continued)

	Page
<i>Mills v. Duryee</i> , 7 Cranch 481; 3 L. Ed. 411	10
<i>Mitchell v. Cunningham</i> , 8 F. (2d) 813	10
<i>Northern Pacific R. Co. v. Spokane County</i> , 22 Wash. 698; 60 Pac. 1135	12
<i>Olson v. Title Trust Co.</i> , 58 Wash. 599; 109 Pac. 49.....	12
<i>Pacific Tel. & Tel. Co. v. Henneford</i> , 199 Wash. 462; 92 P. (2d) 214	11
<i>Sanger Lumber Co. v. Western Lumber Ex- change</i> , 11 F. (2d) 489	10
<i>Stallcup v. City of Tacoma</i> , 13 Wash. 141; 42 Pac. 541	12
<i>State v. Superior Court for Thurston Co.</i> , 62 Wash. 556; 114 Pac. 407	12
<i>Symington v. Hudson</i> , 40 Wn. (2d) 33; 243 P. (2d) 484	9, 22
<i>Union Central Life Ins. Co. v. Chesterley</i> , 100 Wash. 260; 170 Pac. 558	12
<i>U. S. v. Eisenbeis</i> , 112 Fed. 190	10
<i>Walsh v. Wolff</i> , 32 Wn. (2d) 285; 201 P. (2d) 215	11
<i>Woodland v. First National Bank</i> , 124 Wash. 360; 214 Pac. 630	12

TABLE OF STATUTES AND TEXTS CITED

U. S. Constitution, Art. IV, §1	10
13 ALR 1151	28
149 ALR 1195	16
Restatement of Judgments, Sec. 126, p. 610	15
Restatement of Restitution, Sec. 146, p. 585	9
28 Wash. Law Rev. 137	15



ADDITIONAL STATEMENT OF THE CASE

We feel that the facts can be presented in simpler form.

Appellee is the trustee in bankruptcy of Mid-Columbia Publishers, Inc., a bankrupt, sometimes herein called the bankrupt, and succeeded Ernest R. Crutcher, the original trustee.

As trustee Crutcher commenced an action against appellant in the Superior Court of the State of Washington, for Franklin County (R. 13), to recover for conversion of items of property, destruction of a going business, and the conversion of a Model 34 Mergenthaler linotype machine (R. 14). The conversion took place on June 11, 1949 (R. 14). The case was tried to a jury, which found that the value of the linotype approximated \$14,000 (R. 15). The linotype machine, on June 11, 1949 was encumbered by a mortgage given to Mergenthaler Linotype Company, on which the unpaid balance was \$8,550.

The action was tried during the month of March, 1952 (R. 15). The trustee sought to recover the full value of the linotype, without deductions for encumbrance. At the time of the trial appellant had assumed said mortgage and had made certain payments thereon. Appellant, however, in said Superior Court trial did not show such assumption of mortgage indebtedness, nor did it show that it had been and was paying said indebtedness (R. 14, 15), nor is there any evidence of its exonerating the trustee, or the bankrupt itself, from liability on account of such mortgage indebtedness. Although it was admitted that the mortgage aforesaid had been given, the record was totally devoid of any evidence that the mortgage

would have been valid as against the trustee (no showing of compliance with the ten-day filing statute, technical requirements for execution of mortgage in the state of Washington, etc). There was no evidence presented that the mortgagee had absolved the bankrupt or the trustee of its right to prove a claim against the bankrupt estate and thereby surrendered its right to share in the assets available to other creditors.

At the conclusion of the Superior Court trial the trial judge gave its Instruction 29, which reads:

"If you find for the plaintiff for any sum by reason of alleged conversion of any property . . . the plaintiff is entitled to recover the fair cash market value of such property at the date of the alleged conversion thereof, *less any lien indebtedness thereon.*" (Italics ours. R. 41-42)

Crutcher excepted to this instruction.

The jury, by special verdict, deducted from the recovery allowed to plaintiff the sum of \$8,550 on account of such mortgage indebtedness (R. 15). From a judgment in favor of Crutcher, as trustee, against appellant, there was an appeal. The trustee cross appealed from the action of the court in instructing the jury to deduct the sum of \$8,550 (R. 15).

On appeal the judgment of the trial court as against appellant was affirmed, but on the trustee's cross appeal it was ordered that the sum of \$8,550 be added to the judgment (R. 15-16). In holding that the trial judge erred in instructing the jury to deduct the mortgage debt, the court stated:

“ . . . A person who is entitled to bring an action for a conversion, although he has a limited interest in the property converted, may, as against a stranger, recover the full value of the property.” (Citing several cases. R. 40-41).

The court further stated:

“If appellant wanted credit for \$8,550 on the judgment, it had the burden of showing that it had paid that amount or had exonerated Mid-Columbia from all liability therefor; and that appellant failed to do. It was therefore error to offset that amount against the judgment.” (R. 41).

In a petition for rehearing before the Supreme Court appellant urged that the effect of granting the cross appeal would be to unjustly enrich the trustee and appellant petitioned for a remanding of the case to the trial court to permit the taking of evidence to establish that it had assumed and agreed to pay the mortgage, was paying the same, and would pay the same. This petition for rehearing was denied (R. 16). Appellant thereupon paid the judgment of \$8,550 and immediately filed a petition in the bankruptcy proceedings, praying for an allowance of \$8,550 upon the theory that the trustee had been unjustly enriched (R. 17). The Referee dismissed the petition. At the hearing before the Referee, the Referee found, and to the quoted finding no error is specified by appellant, that:

“All matters and things adduced at the hearing before this Court pertaining to the mortgage indebtedness owing to Mergenthaler Linotype Company by the bankrupt and the assumption agreement signed by the petitioner were known to the petitioner

at the time of trial of said Superior Court action.”
(R. 46-47).

Upon review to the Honorable William J. Lindberg, United States District Judge, the order of the Referee was affirmed (R. 18-19).

ARGUMENT

FOREWORD

We have read and reread appellant's brief. Squarely confronted with the bar of *res judicata*, appellant attempts to sidestep that issue with its theory of unjust enrichment. If the doctrine of *res judicata* is to be so easily circumvented, appellant's theory would hold in almost any case and the doctrine of *res judicata* would be cast aside. We comment at the outset that although appellant's case is bottomed on the proposition that appellee has been unjustly enriched, it cites not a single case in which this theory has been adopted to give a litigant a second trial upon issues which could and should have been settled in the first trial. Here appellant had its day in court. It chose not to offer evidence which was available to it and now, six years after the conversion, it seeks to retry those issues before this Court.

1. RIGHT OF PETITIONER TO RESTITUTION OR EQUITABLE RELIEF.

Although appellant's case is bottomed on the proposition that appellee has been unjustly enriched and that a person unjustly enriched must make restitution of the amount enriching him to the person entitled thereto, it

cites no case in which the theory of unjust enrichment has been employed to give a litigant a second trial against his opponent. To do so would do away with the principle that,

“The law requires that there shall be an end to litigation, and where a party has had a full and fair opportunity to make all of the defenses at his command and he elects not to disclose his claims . . . the doctrine of res judicata applies and he cannot later assert.”—*Symington v. Hudson*, 40 Wn. (2d) 33, 243 P. (2d) 484.

The reviewing judge realized this when he cited the following section:

Restatement of Restitution, Sec. 146, p. 585: “A cause of action for restitution against another is terminated by a valid judgment on the merits in favor of the other if the judgment is not reversible or subject to direct independent attack and if it was rendered in a litigation between the two parties in which the existence and extent of the duty were issues that were or could have been finally determined.”

It is stated at page 18 of appellant's brief, under this heading, that the remedy by way of restitution for unjust enrichment “is just as broad as any situation which gives rise to its application.” We will hereafter point out how erroneous this statement is.

2. FULL FAITH AND CREDIT.

Despite appellant's protests, neither the Referee in Bankruptcy, the United States District Court, nor this Court is a part of the judicial system of the State of Washington. Nor does an appeal lie from a judgment

of the Supreme Court of the State of Washington to any of the above United States courts.

Ever since the celebrated opinion of Mr. Justice Story in *Mills v. Duryee*, 7 Cranch 481, 3 L Ed. 411, federal courts have held that under Article IV, Section 1 of the United States Constitution, full faith and credit must be given to judgments of state courts in the same manner as the courts of the state wherein judgment is entered would give to their own, state court, judgments. This court has so held with reference to Washington judgments. *Mitchell v. Cunningham*, 8 F. (2d) 813 (9th Cir). A final judgment of a state court cannot be questioned by a federal court for errors which do not affect the jurisdiction of the state forum. *U. S. v. Eisenbeis*, 112 Fed. 190 (9th Cir). This court held, in *Sanger Lumber Company v. Western Lumber Exchange*, 11 F. (2d) 489 (9th Cir), that federal courts cannot act as reviewing tribunals of Washington judgments. Moreover, even if there were a substantial federal question in the instant case, which there is not, had the state court ruled upon the question the judgment of the state court would be final. *Campbell River Mills Co. v. Chicago Milwaukee St. Paul and Pacific Railroad Co.*, 42 F. (2d) 775, affirmed 53 F. (2d) 69 (9th Cir).

We submit, therefore, that what appellant is attempting to do here is obtain a second trial before federal courts and thus lead the federal courts to the violation of the full faith and credit clause.

3. THIS PROCEEDING IS A COLLATERAL

ATTACK ON THE JUDGMENT OF A STATE COURT AND INVOLVES MATTERS WHICH WERE OR SHOULD HAVE BEEN LITIGATED IN THE STATE COURT.

Below we set forth the language of the Supreme Court of the State of Washington in cases involving the doctrine of *res judicata*.

"Rule forbidding collateral impeachment of judgment by court of competent jurisdiction applies to all questions within issues which were before court and which were, or might have been, there adjudicated."—*Baskins v. Livers*, 181 Wash. 370; 43 P (2d) 42.

"A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon parties to litigation and their privies, and they are not allowed afterwards to revive controversy in new proceedings for purpose of raising same or any other question, matter in dispute having become *res judicata*, and judgment of court importing absolute verity."—*Pacific Telephone & Telegraph Co. v. Henneford*, 199 Wash. 462, denying motion 195 Wash. 553, certiorari denied 59 S. Ct. 483, 306 U. S. 637, 83 L. Ed. 1038; 92 P (2d) 214.

"The doctrine of '*res judicata*' rests upon ground that a matter which has been litigated or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again."—*Walsh v. Wolff*; 32 Wn. (2d) 285; 201 P. (2d) 215.

"When judgment has been rendered, all rights of litigants are merged in it."—*Fisher v. Schwabacher Hardware Co.*, 109 Wash. 257; 186 Pac. 649.

"A judgment bars not only every defense actually raised or set up in the action, but every other defense which might have been urged therein."—*Stallcup v. City of Tacoma*, 13 Wash. 141; 42 Pac. 541 *North-ern Pac. R. Co. v. Spokane County*, 22 Wash. 698; 60 Pac. 1135.

"A losing party cannot try his case over again in a countersuit because he was unprepared originally"—*Kellogg v. Maddocks*, 1 Wash. T. 407;

"A judgment on the merits concludes the parties and their privies, not only as to the things determined, but as to matters which might have been litigated."—*Olson v. Title Trust Co.*, 58 Wash. 599; 109 Pac. 49; *McPherson Bros Co. v. Okanogan Co.*, 61 Wash. 239; 88 Pac. 199; *State v. Superior Court for Thurston Co.*, 62 Wash. 556; 114 Pac. 407; *Merz v. Mehner*, 67 Wash. 135; 106 Pac. 1118; *Hawkins v. Reber*, 81 Wash. 79; 142 Pac. 432.

"Where the mortgage was found to have been forged in an action to foreclose it and the mortgage did not preserve error in denying a claim of lien for taxes paid in good faith, and the findings made no reference to taxes, the judgment was res judicata on the right of the mortgagee to a lien, as the question could have been determined."—*Union Cent. Life Ins. Co. v. Chesterley*, 100 Wash. 260; 170 Pac. 558.

"A judgment or decree on the merits, rendered in a former suit between the same parties and their privies upon the same cause of action, by a court of competent jurisdiction, is conclusive, not only as to all matters determined, but also is conclusive as to matters which might or ought to have been litigated." *Woodland v. First Nat. Bank*, 124 Wash. 360; 214 Pac. 630 *Judish v. Rovig Lumber Co.*, 128 Wash. 287; 222 Pac. 898.

"Where causes of action are same, the rule of res

judicata applies, not only to questions presented but to all matters which rightfully belong to litigation which parties could, by exercising reasonable diligence, have presented at trial.”—*Metropolitan Life Ins. Co. v. Davies*, 2 Wn. (2d) 155; 97 P. (2d) 686.

“Doctrine of res judicata applies, not only to matters actually adjudicated, but to controversies within scope of issues which might have been tried.”—*Anderson v. National Bank of Tacoma*, 146 Wash. 520; 264 Pac. 8 *Anderson v. Peterson*, 147 Wash. 698; 265 Pac. 1118.

At pages 24 and 25 of appellant’s brief, in the quotation from *Commissioner v. Sunnen*, 333 U. S. 591, 92 L. Ed. 898, 68 Sup. Ct. 715, lies appellant’s entire argument. This argument uses as a basis the rule of law that in an action on a *different claim or demand*, a judgment does not operate *as an estoppel* as to matters which might be litigated but only as to matters in issue or points controverted, upon the determination of which the verdict was rendered. This rule of law is itself appellant’s undoing for in relying on it appellant presumes that this action is on a “claim or demand” different from that considered by the courts of Washington.

On the contrary, here we have the same matters in issue and points controverted in the trial of the former cause, where these matters were prosecuted to a jury verdict and there was even a special interrogatory answered by the jury on the very issue in question. (R. 15).

In *Baker v. Cummings*, 181 U. S. 117, 45 L. Ed. 776, 21 S. Ct 578, plaintiff sued on an account. Before defendant pleaded to the complaint he brought an independent ac-

tion against plaintiff to obtain an accounting, setting up in the pleading the existence of a law partnership between the parties and certain fraud of the plaintiff which, had it been interposed in the principal action, would have constituted a ground for a setoff. Defendant received judgment in the other suit for a sum of money, after deduction of the amount claimed by plaintiff in the principal suit. Plaintiff appealed to the Supreme Court of the United States from the judgment in favor of the defendant. The principal action was pending all this time. The Supreme Court dismissed the entire case on the merits. In the principal action the plaintiff set up the dismissal of the second suit as *res judicata* of defendant's right to set off the former demand in the principal case. The court especially noted that the former appeal opinion was, in effect, a decision in plaintiff's favor on the issues presently tendered by way of setoff in that defendant had failed to prove his case and in that the former case was dismissed by the Supreme Court for failure of the defendant to introduce sufficient evidence to entitle him to relief. The Supreme Court therefore held that the former dismissal was *res judicata* of the defendant's right to use the setoffs as a defense, which formerly were the basis of defendant's unsuccessful suit. It is clear that this case is controlling though it is just the reverse of the situation we have here.

The issue at the time of the trial, according to the decision of the Supreme Court of Washington in the *Crutcher* case was whether the bankrupt, and consequently its estate, had been exonerated from liability on the

mortgage debt. (1) There was no proof of such exoneration; (2) the Supreme Court of the State of Washington was not presented with an offer to prove this exoneration; and (3) the Supreme Court of the State of Washington in a final judgment refused to allow the trial court to receive further proof of the mere fact of payment or, for that matter, of any facts pertinent to the case which appellant failed to prove when it had an opportunity to do so. Those issues are the law of this case. *Kennett v. Yates*, 45 Wn. (2d) 35, 272 P. (2d) 22; 28 Wash. Law. Rev. 137.

As will be seen from the authorities hereinafter set forth, the test in cases like this one is always: Were the facts relied on in the collateral proceeding available to the plaintiff in the former case? If they were, and were not adduced in the former proceeding, then plaintiff cannot have a second chance.

In *Restatement of Judgments*, Sec. 126, p. 610, is the rule which is decisive of this appeal:

“Although a judgment is erroneous and inequitable, equitable relief will not be granted to a party thereto on the sole ground that . . . (d) evidence has been discovered not previously available, or that (e) the judgment was the result of a mistake of law or of fact by the Court, or by the present complainant or his attorney. . .”

It is the opinion of the American Law Institute, therefore, that even though “evidence” which would change a judgment is discovered *after* the judgment, a court of equity will not under any circumstances give equitable relief from the legal effect of the judgment.

Appellee may have had a defense to the former action insofar as the right of setoff or reduction of the measure of damages by the amount of the mortgage debt is concerned, but whether there was a failure of proof or not, and whether the Supreme Court of the State of Washington was right or wrong in holding as it did, this Court cannot now question the judgment of that court.

What appellant is attempting to do here is obtain a new trial of an identical issue of fact on the ground that evidence exists, *and did then exist*, which was not presented to the courts of Washington. Even had this evidence been unavailable at the time of the trial and were now to be classified as "newly discovered evidence," this Court could grant no relief.

In a note in 149 ALR 1195, the rule is stated to be well settled that the effect of a judgment as *res judicata* may not be avoided on the ground of newly discovered evidence. At page 1201 of the annotation the author states:

"The rule that the discovery of new evidence does not affect the doctrine of *res judicata* also applies where a judgment is relied on as precluding, by way of collateral estoppel, the litigation of an issue essential to and litigated, and determined by, former judgment."

The Washington rules applicable to this particular case are set out in *Curtis v. Crooks*, 190 Wash. 43, 66 P. (2d) 1140:

"The doctrine of *res adjudicata* was first definitely formulated in the *Duchess of Kingston's* case, and, as stated in 34 C. J. 743, embodies two main rules which are stated as follows:

“The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal.”

“Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.”

“

“Test of Identity of Cause of Action.—If it is doubtful whether a second suit is for the same cause of action as the first, it has been said to be a proper test to consider whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form. If, however, different proofs would be required to sustain the two actions, a judgment in one is no bar to the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has been designated as infallible. Sometimes the rule is stated in the form that the test of the identity of causes of action for the purpose of determining the question of *res judicata* is the identity of the facts essential to their maintenance.’ 15 R.C.L. 964, Sec. 439.

“In *Buddress v. Schafer*, *supra* (12 Wash. 310, 41 Pac. 43), it is said:

“To determine whether a former judgment is a bar to a subsequent action, it is necessary to inquire

whether the same evidence would have maintained both of such actions.'

" 'It is unnecessary to multiply authorities. This principle is laid down by every text writer and sustained by all authority. It is the primary test of *res judicata*. *Mallory v Olympia*, 83 Wash. 499, 145 Pac. 627'."

It will be seen, then, that the test of the identity of the causes of action is met in this case. To prevail in this action appellant must urge the same facts which appellant could and should have urged in the state court (which facts would have constituted a *pro tanto* defense in the sum of \$8,550).

In the following section we will show that the court must follow Washington law in this case.

Let us consider two leading Washington cases on this subject. In *Holt Manufacturing Co. v. Coss*, 78 Wash. 39, 138 Pac. 322, plaintiff unsuccessfully sued a sheriff for conversion of property upon which plaintiff claimed a lien as a mortgagee.

An attaching creditor caused defendant sheriff to levy on certain wheat of the debtor Schoenrock on September 13, 1911. This creditor received a judgment on October 6, 1911, and execution issued that day. The same day plaintiff mortgagee received a judgment of foreclosure and execution issued on the wheat, with instructions to the defendant sheriff to sell it to satisfy plaintiff's lien. The mortgage was executed November 10, 1910. Because the attachment was later, clearly the mortgage, on those facts, was entitled to priority. The two actions were com-

pletely independent of each other, and neither the mortgagee nor the attaching creditor was a party to the action of the other. Ten days after the two executions, the attaching creditor sued defendant sheriff and plaintiff mortgagee to enjoin the sale under the foreclosure and to have the attachment declared superior to the lien of the mortgage. On November 22, 1911, and following the institution of the attaching creditor's action, the debtor Schoenrock was adjudicated a bankrupt. *The following day* the Superior Court action involving priorities of the two liens was submitted to the court on stipulated facts, and on November 27 the court erroneously decreed the attachment lien to be superior to the mortgage lien. Plaintiff mortgagee (defendant there) did not appeal this decision nor (in the stipulated facts) was the court advised that debtor Schoenrock had been adjudicated a bankrupt. The defendant sheriff, pursuant to the decree, sold the wheat.

The Supreme Court of the State of Washington expressly bypassed the question of whether Section 67 of the Bankruptcy Act, which makes void all liens by legal proceedings against the bankrupt's property obtained within four months preceding bankruptcy, was for the benefit of the trustee alone or could be used by other creditors to establish their priority. The attachment was, of course, within four months from the date of bankruptcy.

The decision of the court rested entirely on *res judicata* and the court held that since the facts were being urged in the instant proceeding were in existence at the time of the former proceeding and could have been urged to

the court at that time in support of the plaintiff's position, the matter was *res judicata*. Said the court:

"That judgment not being appealed from, it is necessarily final as to the superiority of the Inland Trading Company's lien insofar as that question could be affected by *facts in existence at the time of the rendition of that judgment*. . ." (Italics are those of the court).

"It is suggested that the bankruptcy adjudication occurring but shortly before the submission of the question of the superiority of the respective liens of appellant and the Inland Trading Company, counsel did not know of the existence of such adjudication and therefore had no opportunity to bring the fact to the attention of the superior court. We have no facts here showing what counsel's knowledge was as to that fact; but, assuming that they had no such knowledge, such fact would only argue that appellant, Holt Manufacturing Company, might be entitled to a new hearing upon the ground of newly discovered evidence and surprise which prevented it from obtaining the judgment it may have been entitled to in the superior court.

"We have, then, a judgment of the superior court upon the very question here presented, which has not been appealed from nor sought to be revised in any manner, and no new fact coming into existence since the rendering of that judgment which is material to the controversy, to-wit, the question of the superiority of the respective liens of appellant and the Inland Trading Company. It is strenuously insisted that there is not here presented the same question as in the former case before the superior court of Adams county. We are unable to see that such is the fact. The real question there involved was the superiority of these respective liens. That is, in its final analysis, the exact and only question here, as it was there,

involved. Counsel for appellant rest their whole case here upon the theory that appellant's foreclosure lien is superior to the attachment and judgment lien of the Inland Trading Company, and they seek to so show by evidence of facts, to-wit, the bankruptcy adjudication which was in existence and might have been brought to the attention of the superior court in the prior action where the question of superiority of the respective liens was involved. Counsel invoked the rule as stated in 23 Cyc. 1290, as follows:

“‘The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.’

“‘The trouble with counsel's contention is that the rule is not applicable here, because the claimed new fact relied upon in support of appellant's foreclosure lien, to-wit, the bankruptcy adjudication of Schoenrock, is not a new or additional fact coming into existence after the rendition of the judgment of the superior court, but is a fact which was then in existence. To be now influenced by that fact in this case would be but to retry what was already tried by the superior court, upon evidence which was then in existence and which was admissible upon that trial. In 23 Cyc. 1291, immediately following the statement of the rule invoked by counsel for appellant, we read:

“‘But if a point or question was in issue and adjudicated in a former suit, a party bound by the judgment cannot escape the estoppel by producing at a second trial new arguments or additional or different evidence in support of the proposition which was decided adversely to him.’

"On the question of identity of issues, or causes of action, where a controversy is claimed to have been rendered *res adjudicata* by a former judgment, in 2 Black on Judgments (2d ed.) Sec. 726, it is said:

" 'For the purpose of ascertaining the identity of the causes of action, the authorities generally agree in accepting the following test as sufficient: Would the same evidence support, and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action.'

"We are of the opinion that the question here involved has been finally determined against appellant by the former judgment of the superior court for Adams county. Whether that judgment was erroneously rendered, or whether it could have been reformed because of mistake or newly discovered evidence, is wholly foreign to the problem here for solution. Of course, respondent in this case stands in the shoes of the Inland Trading Company so far as appellant's rights are concerned."—*Holt Manufacturing Company v. Coss*, 78 Wash. 39, 138 Pac. 322.

The second case we believe to be controlling is *Symington v. Hudson*, 40 Wn. (2d) 331, 243 P. (2d) 484. Defendant sued plaintiff in a former action to quiet title. Plaintiff answered and testified but did not plead or mention the fact that he held a tax certificate to the property on which the redemption period had not expired. At that time, according to the court, plaintiff then had an inchoate title which had not yet ripened by the issuance of a city treasurer's deed. Defendant prevailed in the former action and received a decree quieting title in him, the court having rejected two defenses which plaintiff had pleaded. Thereafter, upon the issuance of a treasurer's

deed to him, plaintiff sued defendant, setting up his title to the property by virtue of the treasurer's deed which was acquired after the decree in the former action. Said the Court:

"The gravamen of the action was a determination of all of the interests in the property claimed by the defendants. The action was not aimed at a particular piece of evidence but was directed to all of the pretensions of Mr. Symington to the title. It put him to a disclaimer or to allegations and proof of all of the interests which he claimed to the property, the nature of which were known to him, or by the use of diligence, could have been known. *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516.

"In *Burke Motor Co. v. Lillie*, 39 Wn. (2d) 918, 239 P. (2d) 854, we held that to have a judgment *res judicata* in a subsequent action there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.

"We have here the same subject-matter, the same parties, and the same quality of persons. The causes of action in the two actions to quiet title were the same: the determination of the superior title to the property based upon facts, all of which were in existence at the time of the first judgment, and which were, or could have been, litigated therein. The judgment in the first action operated upon every claim which properly belonged to the subject of the litigation. *Sayward v. Thayer*, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137. As we have pointed out heretofore, Mr. Symington owned the certificate of purchase at the time of the first action. It properly belonged to the subject-matter of that litigation. The law requires that there shall be an end to litigation, and

where a party has had a full and fair opportunity to make all of the defenses at his command, and he elects not to disclose his claim, as did Mr. Symington, the doctrine of *res judicata* applies and he cannot later assert it *Youngquist v. Thomas*, 196 Wash. 444, 83 P. (2d) 337. The judgment was conclusive upon the issue of the paramount title and of everything that might have been urged for or against such title."

4. PETITIONER IS BARRED FROM EQUITABLE RELIEF BECAUSE IT DOES NOT COME INTO COURT WITH CLEAN HANDS.

The opinion of the Supreme Court of the State of Washington in the instant case, 42 Wn. (2d) 89, 253 P. (2d) 925, dealt with this very problem. Appellant there attempted to establish, doubtless anticipating this very obstacle in this Court, that its conversion was unintentional and inadvertent. The Supreme Court stated that this was "far from the situation in the present case" and held that appellant's assumption that its wrongful act in this case was "not a willful conversion" was "an unwarranted assumption." Appellant having taken the bankrupt's property, having stationed a man armed with a shotgun outside the bankrupt's place of business, and having according to the opinion of the Supreme Court of the State of Washington, thrown the company into bankruptcy ("its principal asset gone, Mid-Columbia was soon in bankruptcy. . ."), we do not see how this Court can say to the trustee that the tortfeasor — appellant — approaches this Court, a court of equity, with the clean hands necessarily precedent to the extraordinary relief it asks.

5. PETITIONER HAS FAILED TO SHOW IN THIS COURT EXONERATION OF THE BANKRUPT ESTATE.

The law of this case, according to the Supreme Court of Washington, is that appellant could only have obtained credit for the \$8,550 mortgage debt had it proved that

“ . . . it had paid that amount or had exonerated Mid-Columbia from all liability therefor; . . . ”

It is interesting to note that the Referee found that as of May 15, 1953, appellant had reduced the mortgage debt to \$3,150 but that no evidence was offered, either in the petition for rehearing filed in the Supreme Court nor in the agreed Statement on appeal in this Court, that the bankrupt estate was exonerated from liability to the mortgagee. In the agreed Statement (R. 17) it is stated that the petition to the Referee stated appellant was “willing to hold the trustee harmless from any liability therefor,” but not that it had done so. In short, there is nothing in this record, after many courts have ruled on this case, in the nature of an indemnity to the trustee from the provable claim of the mortgagee.

6. IN DETERMINING QUESTION OF RES JUDICATA THIS COURT MUST FOLLOW THE LAW OF WASHINGTON.

The law of res judicata of the Supreme Court of the State of Washington is the controlling law in this case to the exclusion of all federal cases, including cases from this Court announced prior hereto, should this Court de-

termine that the law announced in any of these cases is contrary to the law of the State of Washington.

There is no "federal common law" on res judicata. Under the *Tompkins* case, Washington case law must be followed here.

In *Caterpillar Tractor Co. v. International Harvester Co.* (3rd Cir) 120 F. (2) 82, 138 ALR 1, the court held:

"The extent of the collateral consequences of a judgment is a matter of law, and in the absence of statute, judge-made law. The law must be the law of some sovereignty for nowadays we all reject the notion of law characterized by Mr. Justice Holmes as 'a brooding omnipresence in the sky'. *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 ALR 1487. There is certainly very limited scope for a 'general common law' of the United States. Therefore, the question of the effect of the prior judgment is to be determined in the first instance by the law of Nevada where the court rendering it sat."

What we have heretofore stated under this section applies with equal force, of course, to the law regarding the measure of damages for conversion where the converted property is subject to a mortgage, as announced in *Crutcher v. Scott Publishing Co.*, 42 Wn. (2d) 89, 253 P. (2d) 925. That case announced the law applicable to this one insofar as appellant's burden of proof is concerned, and therefore, when the Supreme Court of the State of Washington announced, as it did in the *Crutcher* case, that Scott Publishing Company had failed to support its claim with evidence, the Supreme Court expressed a rule of law which this Court must follow.

7. THE RECORD IS ENTIRELY DEVOID OF EVIDENCE THAT THE MORTGAGE WOULD HAVE BEEN VALID AS AGAINST THE RIGHTS OF THE TRUSTEE.

Neither during the course of the trial in the Superior Court action nor in the proceedings before the Referee did appellant offer any proof whatsoever that the mortgage would have stood up as against the rights of the trustee under Section 70 of the Bankruptcy Act. Had it not been for the conversion, the trustee would have taken over the linotype machine and under Section 70A (5) of the Bankruptcy Act he would have taken it free from the mortgage unless such mortgage had met the statutory requirements. As we have already mentioned, there was a complete lack or absence of proof upon the proposition that the mortgage was valid as against the trustee.

Appellant was not in such a favored position and would merely have taken such rights as the bankrupt had. It is therefore quite conceivable that even had this matter been fully litigated in the original trial, the mortgage would have been determined to be invalid against the trustee and, therefore, not the subject of a deduction. In any event, however, appellant would have been obliged to pay the mortgage, not being a purchaser in good faith.

CONCLUSION

The fact that appellant now brings an independent action, framing it on the theory of unjust enrichment, does not in any manner detract from the proposition that the original matter has been fully and completely adjudicat-

ed. Notwithstanding its contention that it was lulled into error by the trial court (with which contention we are wholly unable to agree), let us remember that instructions are given at the close of a case, after the evidence is submitted. It is always up to counsel to submit his evidence; whereupon the court instructs the jury. For some reason best known to itself, appellant failed to make any proof other than the fact that a mortgage existed—at a time when it was fully possessed and apprised of all of the evidence which it now pleads.

If cases are to be tried piecemeal in this fashion, there is nothing to prevent a situation like this: Plaintiff sues defendant on a promissory note. Defendant has a defense of payment and the statute of limitations. To simplify the trial of the action he relies entirely upon the statute of limitations. The court sustains the defense on this theory, but on appeal to the Supreme Court it is reversed and judgment is ordered for the full amount against the defendant. Defendant then pays the judgment but then maintains an action against the plaintiff to recover the sums which he has paid on the theory that, having paid twice, there has been an unjust enrichment. The position would be untenable. 13 ALR 1151.

There are instances, of course, where the doctrine of *res judicata* can and does have harsh results. In fact, every case involving *res judicata* which we have submitted involves hardship. The courts, however, have recognized consistently that there must be an end to actions and to litigation and it is the duty of a party to avail himself of all of his rights or defenses in the original action. Ap-

pellant's argument is threaded throughout with the claim of hardship which will result. The dead man's statute, the statute of limitations, and the statute of frauds can and do certainly result in equally harsh results. Nevertheless, the fact remains that they are rules and the law must survive, notwithstanding unfortunate applications of its principles.

Respectfully submitted,
THOMAS MALOTT,
Attorney for Appellee.



No. 14761

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE F. EVARTS, MONROVA S. EVARTS, EUGENE K.
EVARTS,

Appellants,

vs.

C. J. JONES, C. S. JONES, JONES BROTHERS, C. J. JONES &
ASSOCIATES, SAN ANTONIO HEIGHTS TRACT, JOHN DOE
I to V, JANE DOE & DOE I to V, BLACK & WHITE COM-
PANY I to V, DOE & DOE CORPORATION I to V, JOHN-
GREEN, doing business as Co-partnership,

Appellees.

APPELLEES' BRIEF.

CLOCK, WAESTMAN & CLOCK,
630 Jergins Trust Building,
Long Beach 2, California,
Attorneys for Appellees.

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
The pleadings and facts alleged therein disclose a lack of jurisdiction	1
No diversity of citizenship.....	2
No Federal question or the construction of any Federal statute involved	2
Appellants have exhausted all of their remedies of appeal in the State courts of California and the State court decisions have become final	2
A brief summary of the three State court proceedings referred to in the complaint that have become final.....	3
Argument	5
I.	
In the absence of a diversity of citizenship the District Court of the United States has no jurisdiction.....	5
II.	
The allegations of the complaint are devoted entirely to facts concerning a controversy over the construction of certain provisions of a conditional sales contract for the purchase of a parcel of real estate in the city of Long Beach and there are no allegations of any matters which raise any Federal question, and the District Court accordingly does not have jurisdiction of this action.....	6
III.	
It appears on the face of the complaint in this action that the Superior Court of Los Angeles County rendered judgment in three cases and that appeals were perfected and the appeal courts affirmed the judgments in each case adverse to the appellants, and those judgments have become final, therefore this court is without power to review or set aside those State court judgments.....	8
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Biggs v. Ward, 212 F. 2d 209.....	9
Columbus R. etc. Co. v. Columbus, 253 Fed. 499, 39 S. Ct. 349, 249 U. S. 399, 63 L. Ed. 669.....	8
Guy v. Utecht, 144 F. 2d 913.....	9
Howard v. Dowd, 25 Fed. Supp. 844.....	9
McLain v. Lance, 146 F. 2d 341, cert. den., 65 S. Ct. 1183, 325 U. S. 855, 89 L. Ed. 1976.....	9
Parker v. Carey, 135 F. 2d 205.....	9
Salem Trust Company v. Manufacturers Finance Company, 264 U. S. 182, 68 L. Ed. 628, 44 S. Ct. 266.....	5

STATUTES

Federal Rules of Civil Procedure, Rule 84.....	7
United States Code Annotated, Sec. 1331.....	8
United States Code Annotated, Sec. 1332A(1)	5

No. 14761

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE F. EVARTS, MONROVA S. EVARTS, EUGENE K.
EVARTS,

Appellants,

vs.

C. J. JONES, C. S. JONES, JONES BROTHERS, C. J. JONES &
ASSOCIATES, SAN ANTONIO HEIGHTS TRACT, JOHN DOE
I to V, JANE DOE & DOE I to V, BLACK & WHITE COM-
PANY I to V, DOE & DOE CORPORATION I to V, JOHN-
GREEN, doing business as Co-partnership,

Appellees.

APPELLEES' BRIEF.

The Pleadings and Facts Alleged Therein Disclose a Lack of Jurisdiction.

The appellees filed a motion to dismiss the appellents' complaint upon the grounds:

(1) That there was no diversity of citizenship between the appellants and the appellees.

(2) That the appellants had filed actions in the courts of the State of California and have exhausted all of their remedies of appeal in those actions and said state court decisions have become final. [Tr. p. 3, lines 19-24.]

This motion was heard by the Honorable Ben Harrison, United States District Court Judge on March 7, 1955, and

an order was made by him dismissing the appellants' cause of action for lack of jurisdiction.

A summary of the allegations on these three grounds are as follows:

No Diversity of Citizenship.

It is alleged in paragraph III of appellants' complaint that the appellants and the appellees are all residents of Los Angeles County, California.

No Federal Question or the Construction of Any Federal Statute Involved.

It is alleged in the complaint [Pars. V, XIII; Tr. p. 409] that the controversy between the appellants and the appellees arises out of the construction of a conditional sales contract entered into between C. J. Jones, one of the appellees and Eugene F. and Monrova S. Evarts, two of the appellants, for the purchase of a parcel of real estate situated in the City of Long Beach, County of Los Angeles, State of California.

Appellants Have Exhausted All of Their Remedies of Appeal in the State Courts of California and the State Court Decisions Have Become Final.

It is alleged in appellants' complaint [Pars. 19-24; Tr. pp. 13-18] that three actions were commenced in the Superior Court of the County of Los Angeles and that judgments were rendered in each of those three cases by a judge of the Superior Court and in each case the judgments were adverse to the appellants and following the rendering of those judgments, an appeal was taken and a decision rendered by an Appellate Court affirming the judgments in each case.

A Brief Summary of the Three State Court Proceedings Referred to in the Complaint That Have Become Final.

(a) The first action was instituted by Eugene F. Evarts and Monrova S. Evarts in the Superior Court of Los Angeles County, when an amended and supplemental complaint for specific performance upon a parcel of property was filed by them on September 27, 1948. A demurrer to this amended and supplemental complaint was filed by the appellees on October 28, 1948, and this demurrer was heard on June 27, 1949, and was, by the Court on that day, sustained with ten days leave to amend. Notice to appellants that the demurrer was sustained and that they were given ten days to amend was served on them on October 7, 1949. Thereafter the motion of the appellees for a judgment of dismissal after sustaining the demurrer with leave to amend, but no amendment filed, was heard on February 27, 1950, and a judgment of dismissal was signed on February 28, 1950. An appeal was taken to the District Court of Appeal, Second Appellate District, and on May 9, 1951, the decision of Division Three of that Court was filed affirming the judgment of dismissal and is reported in 104 Cal. App. 2d 109, 231 P. 2d 74.

(b) The second action was an action filed in the Superior Court of Los Angeles County by the appellees herein to quiet title to the same parcel of real estate as is described in appellants' complaint herein. That action was filed on September 19, 1950, and after service upon appellant, Monrova S. Evarts, a demurrer was filed by her alleging that another action was pending concerning this same parcel of real property. The action which she referred to as a pending action was the above mentioned first action. When the decision in that first case became

final, the demurrer of Monrova S. Evarts was set for hearing and overruled and she filed her answer. The appellant, Eugene F. Evarts having been served and failed to appear, his default was entered thereafter on January 25, 1952. The case was tried before the Honorable George Francis and on February 13, 1952, said Judge signed Findings of Fact and Conclusions of Law and a judgment to quiet title in the appellees herein and against the appellants. An appeal was taken in that case to the District Court of Appeal and thereafter on December 2, 1952, a decision was filed affirming the Superior Court's judgment. The decision is reported in 114 Cal. App. 2d 634, and in 250 P. 2d 671.

Thereafter a motion for a recall of the remittitur in that action was filed and on April 2, 1953, the court denied that motion.

(b) Eugene K. Evarts, one of the appellants herein is the adult son of appellants Eugene F. Evarts and Monrova S. Evarts and has alleged in paragraph XXIII of the complaint [Tr. p. 16, lines 10-26], that a 90% interest in the property involved in this and the Superior Court cases was transferred to their son, Eugene K. Evarts, and he filed a quiet title action August 9, 1952, in the Superior Court of Los Angeles County against the appellees. The deed to the undivided 90% interest to said property, dated January 1, 1950, was not acknowledged until April 14, 1952, and was recorded the next day, April 15, 1952, in the office of the County Recorder of Los Angeles County. A notice of pendency of action in the second case above mentioned was recorded in the office of the County Recorder of said County on September 15, 1950.

This case was tried before the Honorable Joseph Maltby, Judge of the Superior Court of Los Angeles County on April 29, 1953, and on that date judgment was rendered

for the appellee herein and against the appellant, Eugene K. Evarts. The trial court found that the appellee was the owner of and entitled to the possession of the real property and that appellant did not have any estate, right, title or interest whatsoever in or to said real property.

An appeal was taken in said action to the District Court of Appeal, Second Appellate District and a decision was rendered by the District Court of Appeal affirming the judgment of the Superior Court. This decision was filed on September 29, 1954, and is reported in 127 Cal. App. 2d 623, and 274 P. 2d 185.

ARGUMENT.

I.

In the Absence of a Diversity of Citizenship the District Court of the United States Has No Jurisdiction.

The District Court of the United States had no jurisdiction of this action unless there was an allegation in the complaint that a diversity of citizenship existed between the plaintiff and defendants. The appellants herein and plaintiffs in the District Court alleged in paragraph III of their complaint that not only were all of the plaintiffs residents of the County of Los Angeles, but that also that all of the defendants were residents of the County of Los Angeles, State of California. Therefore, it appeared on the face of the complaint that there was not an allegation of diversity of citizenship, but on the contrary a positive allegation that the plaintiffs and defendants were all residents of Los Angeles County. In the face of such allegation the United States District Court had no jurisdiction of the appellants' action.

U. S. C. A., Sec. 1332 A(1);

Salem Trust Company v. Manufacturers Finance Company, 264 U. S. 182, 68 L. Ed. 628, 44 S. Ct. 266.

II.

The Allegations of the Complaint Are Devoted Entirely to Facts Concerning a Controversy Over the Construction of Certain Provisions of a Conditional Sales Contract for the Purchase of a Parcel of Real Estate in the City of Long Beach and There Are No Allegations of Any Matters Which Raise Any Federal Question, and the District Court Accordingly Does Not Have Jurisdiction of This Action.

The appellants alleged in their complaint that they entered into a contract for the purchase of a parcel of real estate and that if interest had been computed in a certain way as they claim it should have been on the unpaid portion of the purchase price of the property, their status under the contract would have been different than as claimed by appellees. The state court agreed with the construction as placed upon the contract by the appellees, and held against appellants construction. Therefore, the appellants were in default under the terms of their contract and their interest terminated.

There is no F. H. A. loan involved in this action or in any of the state court actions, as the appellees herein were not lenders or the appellants borrowers under any such loan. The conditional sales contract provided that the property was subject to a loan which if the appellants could meet certain qualifications and conditions could have assumed, but the appellants could not and did not meet these qualifications and others as contained in the conditional sales contract, so that they never came into the position where they were permitted to make payments on the loan or have anything to do with it. Their sole and only obligation under this contract was to make the monthly payments as provided for thereunder. Therefore,

the appellants' reference in the complaint and in the brief to Federal housing regulations are entirely irrelevant to the controversy that the appellants themselves started in 1948 by the filing of their complaint in the state court against the appellees.

The allegations in the complaint in this action are similar to those alleged in the pleadings filed by them in the state court actions and upon which evidence was presented by the appellants, both oral and documentary, to Judge Francis. The appellants now seek to have their case tried again by the United States District Court after the Superior Court has in one case ruled that their complaint did not state a cause of action and in another case found adversely to the claims and contentions of the appellants and in the third case that their adult son was not a purchaser in good faith of an undivided 90% interest in the property.

We, therefore, most respectfully submit that appellants' complaint fails to allege that their action arises under any particular article or section of the United States Constitution or under any particular act or section of any Federal law or statute and all that is alleged is the bare conclusion that a Federal question exists which is ineffective unless the matters constituting the appellants' claim for relief as set forth in the complaint on their face show or raise a Federal question.

The forms 2-b-oc contained in the appendix of forms under Rule 84 of the Rules of Civil Procedure indicate that general allegations of the existence of a Federal question are ineffective unless there are matters alleged constituting the claim for relief which discloses or raises a Federal question. There are, of course, no allegations of any such matters in this complaint.

The only relief the appellants seek in this action, and it is the same relief they sought in the state court, is for a construction or interpretation as to the method of computing interest under their conditional sales contract for the purchase of the real property.

U. S. C. A., Sec. 1331;

Columbus R., etc. Co. v. Columbus, 253 Fed. 499,
39 S. Ct. 349, 249 U. S. 399, 63 L. Ed. 669.

The trial court's jurisdiction can only arise if the complaint alleges facts which specifically present a Federal question.

III.

It Appears on the Face of the Complaint in This Action That the Superior Court of Los Angeles County Rendered Judgment in Three Cases and That Appeals Were Perfected and the Appeal Courts Affirmed the Judgments in Each Case Adverse to the Appellants, and Those Judgments Have Become Final, Therefore This Court Is Without Power to Review or Set Aside Those State Court Judgments.

The appellants have alleged in paragraphs 19-24 of their complaint that actions were filed in the Superior Court of Los Angeles County, and that following the entry of judgments in that court, all of which were adverse to them, that appeals were perfected and that the Appellate Court affirmed the judgments of the Superior Court. It is therefore apparent that the appellants have exhausted all of their remedies in the state courts and as will be noted in the summary of each of those three cases which we have set forth above, the judgments in each case have long since become final. The appellants now seek to have

the United States District Court review or set aside those judgments of the state court which are between the same parties and over the same subject matter. The appellants in making this request disregard the well established principle of law that the Federal Court has no supervisory jurisdiction over the state courts, and that state court judgments may not be reviewed by a complaint in the Federal court.

McLain v. Lance, 146 F. 2d 341, *cert. den.* 65 S.

Ct. 1183, 325 U. S. 855, 89 L. Ed. 1976;

Guy v. Utecht, 144 F. 2d 913;

Parker v. Carey, 135 F. 2d 205;

Howard v. Dowd, 25 Fed. Supp. 844;

Biggs v. Ward, 212 F. 2d 209.

Conclusion.

Jurisdiction of the Federal District Court is determined by the allegations of the complaint and the appellants have failed to allege any facts that confer such jurisdiction. Therefore, the judgment of the District Court to dismiss the above action should be affirmed.

Respectfully submitted,

CLOCK, WAESTMAN & CLOCK,

By JOHN G. CLOCK,

Attorneys for Appellees.







